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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1123

McEWEN MANUFACTURING COMPANY, - Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, ET AL., - - - - - - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No. _____

McEWEN MANUFACTURING COMPANY, - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., - - - - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner, McEwen Manufacturing Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 29, 1969.

OPINIONS BELOW.

The opinion of the Court of Appeals, which is not yet officially reported, is printed in the appendix to this Petition at pages 1a-6a. The judgment of the Court of Appeals is printed in the appendix hereto at pages 6a-7a. The decision and order of the National Labor Relations Board as issued July 3, 1968, is

printed in the appendix hereto at pages 8a-30a. The modification of its decision and order by the National Labor Relations Board, after petitions for review and enforcement had been filed, styled "Errata," is printed in the appendix hereto at pages 30a-31a. The decision and order of the National Labor Relations Board, including the Errata, is reported at 179 NLRB No. 99, 68 LRRM 1343. The Trial Examiner's decision and recommended order not officially reported, is printed in the appendix hereto at pages 32a-63a. The decision, order and direction of second election of the National Labor Relations Board, dated November 18, 1966, not officially reported, is printed in the appendix hereto at pages 64a-67a. The Regional Director's report on objections to the election, not officially reported, is printed in the appendix hereto at pages 68a-83a.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 29, 1969 (App., *infra,* p. 6a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e) and (f).

QUESTIONS PRESENTED.

The questions here presented are:

1. May the National Labor Relations Board, having sustained objections filed on behalf of the labor organization to a consent election with results adverse to the labor organization and having ordered a second

election, upon refusal of the labor organization to participate in a second election, thereafter, following hearing upon an unfair practice charge upon the same alleged unfair labor practices which were the basis for setting aside the first election, direct the employer to recognize and bargain with the labor organization as the representative of the employees, based upon representation cards antedating the first election?

2. May the National Labor Relations Board, after having entered its decision and order which has been made the subject of petitions for review by the employer and the labor organization and which the Board has sought to enforce by cross-petition, then modify its order, without notice to the employer, so as to add to its decision and order findings that the employer did not act in good faith in denying representation to the labor organization and that the unlawful conduct of the employer made impossible the holding of a free election?

STATUTES INVOLVED.

The statutory provisions principally involved are Sections 7, 8(a)(1), 8(a)(5), 8(c), 9(a), 9(c)(1), 10(d), 10(e) and 10(f) of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*). Such statutory provisions are set forth in the appendix hereto at pages 83a-87a.

STATEMENT OF THE CASE.

This case commenced with the filing of a charge by the Amalgamated Clothing Workers of America, AFL-CIO (the "Union") with the National Labor Relations Board (the "Board") charging that McEwen Manufacturing Company (the "Company") had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (the "Act"), by interfering with, threatening and coercing the employees of the Company in the exercise of their rights under Section 7 of the Act and by failing and refusing to bargain with the Union as the representative of the majority of the employees of the Company. The charge of failure to bargain was based upon the refusal to accede to a demand of the Union for recognition, upon the basis that the Union at that time had valid representation cards signed by the majority of the employees of the Company. Complaint was issued and a hearing was held before a Trial Examiner who found against the Company upon the Section 8(a)(1) violations, but found against the Board and the Union upon the charge of failure to recognize the Union and to bargain with the Union as the collective bargaining representative, finding that the Union did not have valid representation cards signed by a majority of the employees of the Company at the date of demand for recognition. Exceptions were filed by the parties resulting in a decision and order of the Board sustaining the Trial Examiner upon the Section 8(a)(1) alleged violations but overruling the Trial Examiner

upon the Section 8(a)(5) charge and finding that the Union at the time of the demand for recognition had valid representation cards signed by a majority of the employees of the Company on the payroll on May 28, 1966, the date of the demand for recognition.

The Union filed a petition for review because of the failure of the Board to sustain the position of the Union as to another respondent alleged to have constituted a single employer with McEwen. The Board filed a cross-petition for enforcement of its order. The Company in the meantime filed petitions for review in the United States Court of Appeals for the Sixth Circuit, which petitions were filed a few days after the petition was filed by the Union in the District of Columbia Circuit with the result that the petitions filed by the Company were transferred to the District of Columbia Circuit and were consolidated with the petition filed by the Union for disposition.

The petitioner herein seeks a review and reversal of the action of the Court of Appeals for the District of Columbia Circuit in enforcing the order of the Board.

The Company is a Tennessee corporation engaged in the manufacture of overalls and dungarees at McEwen, Tennessee. It is the largest industry in the town. On May 28, 1966 the Company had 172 production employees on its payroll. The Union sought to organize these employees.

1. *Union Organizational Activities.* The first organizational meeting of the Union was held on May 4, 1966 which was attended by fourteen or fifteen em-

ployees of the Company. The second organizational meeting was held on May 9, 1966 which was attended by about twenty employees of the Company. Cleron A. Smith, area director of the Union, spoke at both meetings. Company employees were requested to sign representation cards and to obtain signatures. At the May 9 meeting, in response to questions asked, Smith stated that the purpose of getting the cards signed was in order to have an election, and further, in response to a specific question, stated that persons signing cards did not have to vote for the Union even though they had signed cards, but he hoped that they would vote for the Union at the election. Individual employees, acting as organizers, obtained signatures of employees to cards upon representations (i) that they had to have so many cards signed in order to have an election and if an employee would sign a card the employee would not have to join the Union if the employee did not want to; (ii) that a certain percentage was needed in order to get an election; (iii) that the signatures of a majority were needed before they could have an election and if they did not get a majority signed they could not have an election; (iv) that an employee signing the card would not automatically be a member of the Union; and (v) that an employee signing a card could vote any way the employee wanted to vote at the election which was to be held.

2. *Union Demand for Recognition.* On May 28, 1966 the General Manager of the Company received a letter from the Union, dated May 24, 1966, demanding recognition. Believing that the Union did not repre-

sent a majority of the employees, the General Manager replied on May 31, 1966 expressing doubt as to the Union representation of a majority and refusing to recognize the Union and to meet for collective bargaining negotiations.

3. *Company Representation Petition.* Having heard nothing further from the Union after replying to the Union demand for recognition, the Company, through its counsel, on June 14, 1966, addressed a letter to the appropriate Regional Director transmitting in the usual form a representation petition filed by the Company as employer. This representation petition was filed and served on the Union on June 15, 1966. After the Company's petition had been served upon the Union, the Union made a second demand for recognition by letter dated June 21, 1966.

4. *Stipulation for Certification Upon Consent Election and Election.* On July 8, 1966, the Company and the Union entered into a "Stipulation for Certification Upon Consent Election." The appropriate collective bargaining unit was defined and the payroll period for eligibility was fixed as those employees on the payroll June 25, 1966. The date of the election was fixed as July 27, 1966. Pursuant to the stipulation, on July 14, 1966 the Company furnished to the Regional Director and the Regional Director furnished to the Union the names and addresses of all employees in the unit at the payroll period ending June 25, 1966. At the hearing before the Trial Examiner, which was the forerunner of the decision of the Board in this case directing the Company to recognize and bargain with

the Union, 109 representation cards were produced as having been signed by employees on the payroll on May 28, 1966, the date the recognition demand was received by McEwen. Seven of the persons named had voluntarily quit before May 28, 1966. Between May 28, 1966 and June 25, 1966, 8 of these employees terminated their employment voluntarily. On July 27, 1966, prior to the election on that date, a pre-election conference was held and the names of certain employees who had voluntarily terminated their employment between June 25, 1966 and July 27, 1966 were removed from the eligibility list. Of the 109 cards later used at the hearing as being employees on the payroll as of May 28, 1966 who had signed representation cards, 7 had quit before May 28, 1966, 8 had voluntarily terminated between May 28, 1966 and June 25, 1966, and 3 had voluntarily terminated their employment between June 25, 1966 and July 27, 1966. Thus, on the date of the election of July 27, 1966, of the alleged signers of 109 cards which were later offered to show a majority representation by the Union on May 28, 1966, 18 had voluntarily terminated their employment before the date of the election. As the result of these voluntary terminations and new hires, instead of 172 production employees, the Company on July 27, 1966, the date of the consent election, had 164 production employees. Of the 164 eligible voters 96 voted against the Union, 60 voted for the Union, 1 ballot was challenged, there were 3 void ballots and 4 persons did not vote.

5. *Objections to Conduct Affecting the Result of the Election.* The Union filed timely objections to

conduct affecting the result of the election. The objections were based: (i) upon the contents of a letter from the Company to all employees on or about July 14, 1966; (ii) the alleged statements of a supervisor on June 22, 1966; (iii) the alleged wrongful discharge of an employee on July 11, 1966, and (iv) alleged surveillance of a Union meeting. The Union further contended that the letter of July 14, 1966 should be considered in context with the speech by the Company President on June 3 or 4, 1966, and also in context with alleged threats by supervisors on June 7, 8 and 13, 1966. The Regional Director included in his study of the objections a speech of the Company President on July 26, 1966. Upon consideration of the letter of July 14, and the speech of July 26, the Regional Director found that the Company thereby created an atmosphere of fear in which the free expression of choice of the employees was rendered impossible. The first objection to the Union was sustained. The other objections were overruled. Having recommended that objection No. 1 be sustained, the Regional Director further recommended that the election of July 27, 1966 be set aside and a new election be directed.

6. *Decision and Order of Board Directing Second Election.* The Company filed exceptions to the Regional Director's report. The Union filed exceptions conditioned on the Board overruling the Regional Director's recommendation. The Board, through a panel composed of members Fanning, Brown and Zagoria, on November 18, 1966, adopted the Regional Director's findings and recommendation with regard to

Union objection No. 1, and directed a second election without passing upon the Regional Director's findings and recommendations with respect to objection No. 2.

7. *Union Refusal to Participate in Second Election.* The Union refused to participate in the second election ordered and directed by the Board. Instead, the Union on November 10, 1966, filed a charge alleging violations of Sections 8(a)(1) and 8(a)(5) of the Act. The Union claimed by virtue of certain representation cards, that it was the duly designated bargaining representative of a majority of the production and maintenance employees of the Company on May 28, 1966, the date that the Company refused to recognize and to bargain collectively with the Union. On November 23, 1966, the Union wrote the Regional Director stating that the Union could not authorize the Regional Director to proceed with the second election.

8. *Trial Examiner's Decision.* Complaint was issued on December 30, 1966, upon the charge filed by the Union on November 10, 1966, and hearings commenced on February 7, 1967. The Trial Examiner in his recommended decision referred to and quoted from the Regional Director's report of objections to the election as adopted by the Board, held that he was bound by the findings and legal conclusions of the Board in the representation case wherein the second election was ordered, and further held that the findings and conclusions of the Board sustaining objections to the election, also in the light of the record made before him, sustained the finding that the Company violated

Section 8(a)(1) of the Act by the President's speech on July 26, 1966, and the letter of July 14, 1966. The Trial Examiner further found that misconduct of supervisory employees in interviews of and statements made to employees constituted interference with, restraint and coercion of employees in the exercise of the rights guaranteed by Section 7 of the Act and the Company thereby violated Section 8(a)(1) of the Act. Upon the Section 8(a)(5) charge 109 cards were presented at the hearing by the General Counsel to show that the Union on May 28, 1966 had a majority status. The Trial Examiner excluded the 7 cards of employees who had terminated their employment before May 28, 1966 and excluded 2 other cards for reasons stated at the hearing. Upon consideration of the 100 cards which were admitted as seemingly valid cards, the Trial Examiner found that 14 of the cards were not valid representation cards, thereby destroying the claim of majority status by the Union.

9. *Decision and Order of the Board.* Exceptions were filed by all parties to the Trial Examiner's decision. The Board on July 3, 1968 issued its decision and order, agreeing with the Trial Examiner's conclusion, without adopting his rationale, that the Company had violated Section 8(a)(1) of the Act by the Company President's letter of July 14, 1966 and speech of July 26, 1966, and also agreeing with the Trial Examiner that the Company, through its supervisors, had violated Section 8(a)(1) of the Act by interrogation of the employees about their Union sympathies, threatening the employees with economic

reprisals if they selected the Union to represent them, and promising benefits if the employees refrained from supporting the Union. Contrary to the finding by the Trial Examiner, however, the Board found that the Union was entitled to recognition on May 28, 1966, and the Company's refusal to grant recognition and to bargain with the Union violated Section 8(a)(5) of the Act. In making this decision, the Board made no finding with reference to good faith or lack of good faith on the part of the Company in denying recognition, nor did the Board make any finding that the unlawful conduct of the Company made the holding of a free election impossible.

10. *Modification of Order by Board.* Within less than a week after the issuance of the Board order, the Union had filed its petition to review in the District of Columbia Circuit and the Company had filed its petition for review in the Sixth Circuit. The Board then filed its cross-petition for enforcement in the District of Columbia Circuit and the Company intervened in the District of Columbia Circuit. After these actions had been taken, the Board, without notice to the Company, added language to its order of August 15, 1968, in the form of a document described as Errata, modifying its decision and order by making substantial changes therein and adding language to the detriment of the Company without notice to the Company. In substance in its Errata the Board found and, without notice to the Company, added to its original decision and order the finding that the Company had not acted in good faith in refusing to recognize the Union, but

petitioned for a representation hearing acted in order to gain time within which to dissipate the Union's majority and thereby evaded its statutory obligation to recognize and bargain with the Union. The Board further found and added to its order that the finding that the unlawful conduct of the Company made impossible the holding of a free election and that consequently the Board had no alternative but to look to signed authorization cards as the only available proof of the choice the employees would have made absence the employer's unfair labor practices. The panel issuing the decision and order of the Board and later adding the Errata consisted of members McCulloch, Fanning and Brown. Two of these members had been members of the panel of the Board which on November 18, 1966 had held that, based upon substantially the same charges of unfair practices, the appropriate remedy would be the direction of a second election.

11. *Decision of Court of Appeals.* The Company filed its petitions for review of the order of the Board in the United States Court of Appeals for the Sixth Circuit, filing the first petition based upon the Board order of July 3, 1966, and filing its second petition based upon the insistence that by the addition of the Errata of August 15, 1968, the Board entered a new decision and order. Both petitions were filed after the Union had filed its petition for review in the District of Columbia Circuit. The Company's petitions were transferred to the District of Columbia Circuit and were consolidated with the Union petition for disposition. Under the issues made, the Company in-

sisted that: (i) there was no substantial evidence supporting the finding of the Section 8(a)(1) violations; (ii) the Company by refusing to recognize the Union on May 28, 1966 did not violate Section 8(a)(5) of the Act; (iii) the Union did not have valid representation cards executed by a majority of the employees of the Company on May 28, 1966; (iv) the Board having considered the alleged Section 8(a)(1) violations upon review of the Regional Director's report on objections and having determined that the appropriate remedy would be the direction of a second election could not thereafter require the Company to recognize and to bargain with the Union upon the basis of the representation cards relating to May 28, 1966; (v) the Company and the Union having stipulated and consented, with the approval of the Board, that the payroll as of June 25, 1966 should determine the eligibility date in connection with a consent election to determine representation, the Board could not thereafter return to the date of May 28, 1966 as the basis for determining majority representation by the Union; (vi) the Board having issued its decision and order on July 3, 1968, which had become the subject of petitions for review and cross-petition for enforcement, could not thereafter, without notice to the Company, materially modify such decision and order by making other findings to the prejudice of the Company and embodying them in the order.

In its opinion, the Court of Appeals held that: (i) there was substantial evidence supporting the finding of the Board that the letter and speech by the Com-

pany President which had been made the basis of the action setting aside the first election and ordering the second election, and the acts of interrogation and intimidation by Company supervisors violated Section 8(a)(1); (ii) such violations of Section 8(a)(1) served as a predicate for the Board's order to bargain under *NLRB* v. *Gissel Packing Company,* 395 US 575 (1969); (iii) the Board properly counted certain cards objected to by the Company in determining majority representation as of May 28, 1966; (iv) the Board properly concluded that the Union represented a majority of employees on May 28, 1966; (v) the Company had made a free election impossible; (vi) under *Gissel* the Board was justified in issuing an order to bargain; and (vii) the modification of the Board's order by adding the Errata did not prejudice the Company. The Court of Appeals denied the Company's petition to review and granted the Board's cross-application for enforcement.

REASONS FOR GRANTING THE WRIT.

The purpose of a representation proceeding, or of a hearing under a Section 8(a)(5) charge, is to determine whether the employees of an employer, while acting free from interference, coercion or intimidation by the employer or by the Union, and free from the influence of misrepresentations by either the employer or the Union, have expressed a free choice of a collective bargaining representative. It is the intent of the law that employees not be deprived of this free exercise of their right to select a collective bargaining

representative. It likewise is the intent of the law that there shall not be imposed upon the employees a collective bargaining representative who has not been freely designated by the majority of the employees in a bargaining unit. In this case the Union on May 28, 1966 advised the Company that it represented the majority of the employees of the Company as collective bargaining representative for collective bargaining purposes. The demand for recognition was not an unqualified demand. Among other things, the letter from the Union to the Company said:

> "We are prepared to prove our majority by submitting our authorization cards to a mutually agreeable third party, provided that under no circumstances will the names of those employees who signed cards be revealed."

Later at the hearing, when the 109 cards were presented, serious questions were raised as to the representations which were made to the employees when the cards were signed and some question was raised about some signatures. One card in particular did not bear a signature, but bore a printed name. When compared with the employee's W-2 form, there was no resemblance between the printed name and the signature. The Trial Examiner refused to consider this card. The individual whose name was printed on the card did not testify at the hearing. Another witness testified that she had seen the individual print his name on the card. This card was counted by the Board and this action of the Board was approved by the Court of Appeals. Let us assume, however, that this card had

been presented to this mutually agreeable third party, then the question arises, what would he have done with reference to whether he would have counted this card or would not have counted it. The mutually agreeable third party could not take evidence. He could only compare signatures on the card with signatures on the W-2 forms held by the employer. This is the type of evidence which the Board and the Court of Appeals have accepted as indicating a free choice of a collective bargaining representative. We have not gone into details with reference to objections to various other cards. *Gissel* precludes a discussion of the question of representations which were made at the time the cards were signed. Signatures or printed names obtained in the plant rest rooms, on the parking lots or in the Union meeting hall now have the same finality of decision as does the secret ballot behind the curtain, when the individual communes with himself alone.

There are questions raised in this case which were not presented in *Gissel*. We address ourselves to the two questions stated as being presented by this petition and the sub-issues arising thereunder:

A. The Union Should Not Have Been Certified as the Bargaining Representative on the Basis of the Representation Cards Antedating the First Election.

The first question presents the issue as stated in this caption.

1. THE UNION STIPULATED AND CONSENTED THAT JUNE 25, 1966 WAS THE PAYROLL ELIGIBILITY DATE RATHER THAN MAY 28, 1966.

After the Union made its demand for recognition, which was received by the Company on May 28, 1966, the Company filed a representation petition. The Union at that time had its choice of filing a charge that the Company had engaged in unfair practices, and had violated Section 8(a)(1) and 8(a)(5) by refusing to recognize the Union upon the demand of May 28, 1966. The Union chose, however, under date of July 8, 1966 to enter into a stipulation for certification upon consent election. The Union, with the approval of the Board, agreed in this stipulation the payroll eligibility date was June 25, 1966. It is shown in the record that a number of employees had terminated their employment voluntarily after having signed cards before May 28, 1966 and others had terminated their employment voluntarily before June 25, 1966. By agreement of the Union, approved by the Board, June 25, 1966 became the determinative date. The letter of the Company President of July 14, 1966 had not then been written and the Company President's speech of July 26, 1966 had not then been made. The dates of the alleged conversations between the Plant Manager and

two supervisors and certain employees which were later considered by the Trial Examiner as including Section 8(a)(1) violations, had passed. The failure to recognize the Union in response to the demand of May 28, 1966 had occurred. Despite these events the Union chose to enter into the consent election and chose to fix June 25, 1966 as the date to determine the question of representation. The date of May 28, 1966, therefore, was not and could not have been a determinative date for purposes of collective bargaining representation.

2. THE BOARD ELECTED THE REMEDY TO BE GRANTED THE UNION WHEN IN RESPONSE TO THE UNION'S OBJECTIONS TO THE ELECTION THE BOARD ORDERED A SECOND ELECTION.

The stipulation for certification upon consent election was entered into on July 8, 1966, and the election was held on July 27, 1966 pursuant thereto. The alleged unfair labor practices which occurred between July 8, 1966, the date of the stipulation, and July 27, 1966, the date of the election, were the letter of the President of the Company on July 14, 1966 and the speech of the President of the Company on July 26, 1966. The Union, with full knowledge of the alleged unfair labor practices which were said to have occurred in the form of interrogations, intimidation, threats and coercion, and the speech and the letter referred to, filed its objections to the election the details of which have been stated in the Statement of the Case. The Union relied upon the letter and the speech, one instance of alleged interrogation, an alleged discriminatory discharge and alleged surveillance. The Regional

Director sustained the Union with reference to the letter and the speech but ruled against the Union with reference to the alleged intimidation, threats and coercion, as well as in the matter of the alleged discriminatory discharge and alleged surveillance. The Union initiated this review by the Board by its objections to the election. The Union did not then file a charge of a Section 8(a)(5) violation. The Company excepted to the report of the Regional Director on objections. The Union excepted upon the possibility that the Company's exceptions might be sustained. Here again the Union had its choice of filing a charge of Section 8(a)(1) and Section 8(a)(5) violation, but the Union contented itself with maintaining its position with reference to obtaining a second election. The Board reviewed the Regional Director's report and approved the report. The Board had before it the letter and speech which are continuously referred to throughout this record as being Section 8(a)(1) and 8(a)(5) violations. The Board had before it the evidence with reference to the alleged unfair practice by interrogation by a supervisor. The Board directed a second election. The Union did not file a Section 8(a)(5) charge, nor did the Board order the Company to bargain with the Union. In *Gissel* this Court has said:

> "In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that

> the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that the employees' sentiment once expressed through the cards would, on balance, be better protected by a bargaining order, then such an order should issue."

This Court has said, however, that there are other cases where the Board in the exercise of its remedial power will not grant a bargaining order. As this Court pointed out in *Gissel:*

> "We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order."

The sense of *Gissel* seems to be that when a Section 8(a)(5) matter is presented to the Board and the issue is what the remedy shall be, the Board, upon finding that the past practices of the employer prevent a fair election, may direct that a bargaining order be issued. On the other hand, the Board may find that the unfair labor practices are of minimal impact and in such case not issue a bargaining order. In lieu of a bargaining order, the Board obviously may direct a second election.

The Board directed a second election in this case and having done so, it is submitted that the Board had exercised its remedial power as based upon the facts.

The Union refused to proceed with the second election and filed charges of Section 8(a)(1) violation and

Section 8(a)(5) violation. It was improper for the Board to grant a bargaining order under the complaint issued pursuant to this charge on the same facts upon which the Board had directed a second election.

3. THE UNION WAIVED THE SECTION 8(a)(5) CHARGE AND RELIEF THEREIN BY FILING OBJECTIONS TO THE ELECTION WITHOUT FILING A CHARGE OF SECTION 8(a)(5) VIOLATION.

The facts of this case are not parallel with either of the cases which are considered under *Gissel.* Here the Company, within two weeks after receiving the Union's demand for recognition filed an employer's representation petition, setting in motion the processes of the Board for determining representation. Of the cases which are reported under *Gissel,* General Steel Products, Inc., which was considered along with Gissel Packing Company, and Hecks, Inc., as No. 573, deserves most consideration.

For comparison of these cases, we quote from *Gissel* as follows:

> "In *Gissel,* where the employer's campaign began almost at the outset of the Union's organizational drive, the Union (petitioner in No. 691) did not seek an election, but instead filed three unfair labor practice charges against the employer, for refusing to bargain in violation of §8(a)(5), for coercion and intimidation of employees in violation of §8(a)(1), and for discharge of Union adherents in violation of §8(a)(3). In Heck's an election sought by the Union was never held because of nearly identical unfair labor practice

charges later filed by the Union as a result of the employer's antiunion campaign, initiated after the Union's recognition demand. And in General Steel, an election petitioned for by the Union and won by the employer was set aside by the Board because of the unfair labor practices committed by the employer in the pre-election period."

In *General Steel Products, Inc.,* 157 NLRB No. 59, 61 LRRM 1417, it appears that after the Union lost the election the Union filed objections to the election which were consolidated for hearing with the complaint case, wherein the Company was charged with Section 8(a)(1) and section 8(a)(5) violations. It does not appear that the objections to the election were disposed of other than in the complaint case.

In the fourth case considered under *Gissel, Sinclair Company,* No. 585 (164 NLRB No. 49, 65 LRRM 1087), the employer upon demand refused to recognize the Union. The Union filed a petition for an election. An election was ordered and held, resulting in the loss of the election by the Union by one vote. The Union then filed objections to the election and unfair labor practice charges which were consolidated for hearing before the Trial Examiner.

Possibly it is not particularly significant upon the question of the Section 8(a)(5) charge, but it should be pointed out that the Company in our case sought the services of the Board in determining the question of representation, whereas, neither of the companies considered under *Gissel* filed a representation petition.

Further, in *General Steel* and *Sinclair,* both decided under *Gissel,* the Union filed objections to the election and at the same time filed Section 8(a)(1) and Section 8(a)(5) charges, and the objections in both instances were consolidated with the charges and heard by the Trial Examiner. In the case now before the Court in this petition, the Union pursued its objections to the end and obtained an order from the Board directing a second election. This action constituted an election of remedies on the part of the Union and upon the part of the Board. When the second election was ordered, the remedial processes of the Board had been completed upon the question of refusal to bargain.

B. The Board Could Not Materially Modify Its Order Without Notice to the Company.

The Board issued its decision and order on July 3, 1968. As is pointed out in the note to the opinion of the Court of Appeals, the Board modified its order on August 15, 1969, after petitions for review had been filed by both the Union and the Company. This modification was without notice to the Company. The Court of Appeals found that this modification made a finding, which theretofore had not been made, to the effect that the Company had not acted in good faith when it refused to recognize the Union and filed a representation petition for the purpose of determining the representation question. This, it is submitted, was seriously to the prejudice of the Company. Further, in its modification of its order, the Board added a finding that the "unlawful conduct of the Company made

impossible the holding of a free election and that consequently the Board had no alternative but to look to signed authorization cards as the only available proof of the choice employees would have made absent the employer's unfair labor practice."

The Court of Appeals held that this finding did not prejudice the Company. In his report on objections to the election filed September 2, 1966, the Regional Director found that because of the letter of July 14, 1966 and the speech of July 26, 1966, "the employer created an atmosphere of fear in which the free expression of choice of the employee was rendered impossible." The Regional Director on this finding recommended a second election. The Board, by its decision, order and direction of second election issued November 18, 1966, adopted the Regional Director's findings and recommendations. The Board, however, apparently did not feel at that time that such a finding justified the conclusion that the Board had no alternative but to look to signed authorization cards as the only proof of the choice employees would have made absent the employer's unfair labor practices. The Board at that time upon the basis of the same finding with reference to the first election directed the holding of a second election. The incorporation of this finding into the order of July 3, 1968 as compelling a bargaining order was most prejudicial to the Company and wholly contradictory of the action of the Board in directing a second election.

Section 10(d) of the Act (29 U.S.C. 160(d)) is clear in its provisions:

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

The Board may modify the order *upon reasonable notice.* No notice was given the Company when the Board undertook to modify its order in the material particulars above stated almost a month after the order had been issued.

CONCLUSION.

For the reasons stated a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.* WASHINGTON INDUSTRIES, INC., and MCEWEN MANUFACTURING COMPANY, *Intervenors.*	No. 22,088
MCEWEN MANUFACTURING COMPANY, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Nos. 22,568 22,569

PETITION TO REVIEW AND MODIFY, PETITIONS TO REVIEW AND SET ASIDE AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Decided November 13, 1969

Mr. Jacob Sheinkman for petitioner in No. 22,088.

Mr. Edward Carmack Cochran for petitioner in Nos. 22,568 and 22,569 and intervenor McEwen Manufacturing Company in No. 22,088.

Mr. Seth D. Rosen, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Connecticut, *pro hac vice,* by special leave of court, for respondent. *Messrs. Arnold Ordman,* General Counsel, National Labor Relations Board, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Herman M. Levy,* Attorney, National Labor Relations Board, were on the brief for respondent.

Mr. Wilson Sims for intervenor Washington Industries, Inc.

Before WRIGHT, LEVENTHAL and ROBB, *Circuit Judges.*

PER CURIAM: This appeal consolidates various competing petitions to review, modify, set aside, and enforce an order of the National Labor Relations Board holding that the McEwen Manufacturing Company had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act[1] during the course of an organizational campaign and representation election involving the Amalgamated Clothing Workers of America, AFL-CIO. The company seeks to set aside the finding of 8(a)(1) and 8(a)(5) violations and the Board order to bargain with the union. The union petitions for review of the Board's finding that McEwen and its parent, Washington Industries, Inc., were not joint employers under the Act; for review of the Board's decision that McEwen had lawfully established a non-solicitation rule; and to require the Board to order certain additional remedies. We reject these challenges to the Board's decision and enforce its order.

I.

The Board found that a letter and speech by McEwen's president to all employees just before the election warning that the plant might be closed if the union won, and the "extensive and widespread acts of interrogation and intimi-

[1] 29 U.S.C. §§ 158(a)(1) and (5) (1964).

dation" of employees by company supervisors violated Section 8(a)(1).[2] After a careful review of the record, we find that substantial evidence supports this finding.

The company argues that in any event its Section 8(a)(1) violations may not serve as a predicate for the Board's order to bargain. The Supreme Court last term made it clear in *NLRB* v. *Gissel Packing Co.*[3] that "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue * * *."[4] We find substantial evidence to support the Board's conclusion that the interrogation by company supervisors and the speech and letter from the company president made the holding of a fair election impossible.[5]

The company, however, challenges the Board's finding that on May 28, 1966, the union had valid authorization cards from a majority of the employees. The company's basic contention is that some of the authorization cards

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[2]The Board's decision and order are reported at 172 NLRB No. 99 (1968).

[3]395 U.S. 575 (1969).

[4]395 U.S. at 614-615. The Court indicated that a bargaining order could also be imposed "without need of inquiry into majority status" where the "employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." *Id.* at 613, 615.

[5]The Company points out in its brief that on August 15, 1969, the Board amended its order of July 3, 1969, by issuing an errata containing a further paragraph. This errata was added after petitions for review had been filed by both the union and the company. We rejected a motion to strike the errata from the record on October 3, 1968. We see no reason to strike that errata now. The additional paragraph in no way altered the remedial order; it merely amplified the rationale behind the Board's decision and helped explain why the Board felt that an order to bargain would be necessary. The company was in no way prejudiced by the addition of this errata.

were obtained by union misrepresentations, the signers being told that the "signatures were being obtained for the purpose of holding an election, [and] that the signer would have the opportunity to vote [for or against the union] at the election." Cards like those in question here which clearly and unambiguously designate the union as the signer's bargaining agent can be used to show a union's strength unless the union representatives in obtaining the cards "deliberately and clearly cancel[l] [the clear language of the card] with words calculated to direct the signer to disregard and forget the language above his signature." Since elections usually follow even when authorization cards are solicited, a representation that there will be an election does not of itself invalidate the cards.[6]

The company also contends that the cards of 18 employees are invalid because those employees were never called before the trial examiner to identify their signatures. However, the courts have not imposed any requirement of authentication by the signer personally; testimony by one who witnessed the signature is adequate. *Colson Corporation* v. *N.L.R.B.*, 8 Cir., 347 F. 2d 128, 134, *cert. denied*, 382 U. S. 904 (1965) Fifteen of these cards were authenticated by people who witnessed their execution. The other three cards were properly authenticated by testimony that

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[6] *NLRB* v. *Gissel Packing Co., supra* Note 3, 395 U.S. at 606. In *Gissel* the Court explicitly approved the following reasoning of a trial examiner:

> "With respect to the 97 employees named in the attached Appendix B Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told *one or more* of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face."

395 U.S. at 584 n.5; *id.* at 608. (Emphasis in original.)

the signer had returned the card to the union agent, thus adopting as his own the signature thereon.[7]

Since the Board properly concluded that the union did represent a majority of the employees on May 28, 1966, and that the company had made a free election impossible, under *Gissel* the Board was justified in issuing an order to bargain.

II.

With respect to the points raised by the union, we affirm the Board's conclusion that the no-solicitation rule was lawfully established by the company in this case. The rule was admittedly valid on its face and on this record we cannot fault the Board's finding that it was not promulgated for a discriminatory purpose. *See United Steelworkers of America* v. *N.L.R.B.*, 129 U. S. App. D.C. 260, 262, 393 F 2d 661, 663 (1918) We reject also the union's claim that additional remedies are required. The Board's wide discretion to fashion appropriate remedies insulates its action in this case from judicial intervention.[8]

Finally, the union asserts that McEwen and its holding company parent, Washington Industries, were joint employers under the Act and that the Board's order should

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[7] *N.L.R.B.* v. *Howell Chevrolet Co.*, 9 Cir., 204 F. 2d 79, 85-86, *enforcing* 95 NLRB 410, *affirmed on other grounds*, 346 U.S. 482 (1953).

The company on appeal to this court argued that one card should not have been counted because the signature on the card was printed, although the withholding certificate in the company's possession for the same employee was signed in script. The trial examiner concluded that the card should not be counted because, in view of the discrepancy between the signatures, he felt that the General Counsel had failed to prove the authenticity of the signature on the card despite the testimony of a witness to the execution. The Board reversed the trial examiner as to this card and found that the signature was valid in view of the "uncontradicted testimony" of the fellow employee who witnessed the signature. Since the Board obviously credited the uncontradicted testimony, it was justified in predicating its ruling on it.

[8] *United Steelworkers of America, AFL-CIO, Local 5571* v. *N.L.R.B.*, 130 U.S. App. D.C. 369, 373, 401 F. 2d 434, 438 (1968).

also run against Washington Industries. Again, on this record we cannot fault the Board's disposition of this contention. *See M. Lowenstein & Sons, Inc.*, 150 NLRB 737 (1964); *compare Freda Redmond and Sir James, Inc.*, 147 NLRB 1025 (1964). This court, of course, remains open to deal with any interference with its enforcement order by persons not now parties to this proceeding.[9]

Accordingly, the union's petition to review and modify is denied, the company's petitions to review and set aside are denied, and the Board's cross-application for enforcement is granted.

So ordered.

JUDGMENT—Filed December 29, 1969.

Before: WRIGHT, LEVENTHAL and ROBB, Circuit Judges.

The above consolidated causes came on to be heard upon petitions to review, and a cross-application for enforcement of, an order of the National Labor Relations Board dated against July 3, 1968, against McEwen Manufacturing Company, its officers, agents, successors and assigns. The Court heard argument of respective counsel of October 21, 1969, and has considered the briefs and transcript of record filed in these causes. On November 13, 1969, the Court being fully advised in the premises handed down its opinion denying the petitions for review and granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the District of Columbia Circuit that the petitions for review filed by Amalgamated Clothing Workers of America, AFL-CIO,

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[9] 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE and PROCEDURE § 1437 (Wright ed. 1968 Pocket Part). *See Regal Knitware Co.* v. *N.L.R.B.*, 324 U.S. 9, 14 (1945); *Bullock* v. *United States*, 6 Cir., 265 F. 2d 683, 691, *cert. denied*, 360 U.S. 909, 932 (1959); *Kasper* v. *Brittain*, 6 Cir., 245 F. 2d 92, 96, *cert. denied*, 355 U.S. 834 (1957).

be and hereby are denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that McEwen Manufacturing Company, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

(s) J. Skelly Wright,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

(s) Harold Leventhal,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

(s) Roger Robb,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

McEwen Manufacturing Company and Washington Industries, Inc.	
and	Case No. 26-CA-2598
Amalgamated Clothing Workers of America, AFL-CIO	

DECISION AND ORDER.

On May 23, 1967, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondent McEwen Manufacturing Company (herein called McEwen) had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent McEwen had not engaged in certain other unfair labor practices alleged in the complaint and recommended that these allegations of the complaint be dismissed. The Trial Examiner granted the motion to dismiss the complaint as to Respondent Washington Industries, Inc. (herein called Washington). Thereafter, Respondent McEwen, the General Counsel, and the Charging Party each filed exceptions to the Trial Examiner's Decision and a brief in support thereof. In addition, the General Counsel and the Charging Party filed briefs in answer to the Respondent's exceptions; and, finally, Respondent Washington filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, briefs, answering briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner with the modifications discussed below:

1. In agreement with the Trial Examiner, we find that the Respondent McEwen is the sole employer of the employees here involved, and that the complaint against Washington Industries, Inc. (herein called Washington) as a joint employer was properly dismissed.[2]

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[1]Respondent McEwen has excepted to many of the credibility findings made by the trial Examiner. It is the Board's established policy, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the preponderance of all the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

[2]*M. Lowenstein & Sons, etc.*, 150 NLRB 737, footnote 2 at 738; cf. *See Bee Slurry Matic, Inc.*, 169 NLRB No. 30; and cf. *Miami Newspaper Printing Pressmen Local No. 46 etc. (Knight Newspapers, Inc.)*, 138 NLRB 1346, enfd. *sub nom Miami Newspaper Printing Pressmen's Local 46* v. *N.L.R.B.*, 322 F. 2d 405 (C.A. D.C.). Member Brown, in agreement with the General Counsel's contention, would find that Washington and McEwen are joint employers for purposes of this proceeding in view of their close ownership and management relationships. As more fully described by the Trial Examiner, Washington, a holding company, is the sole owner of First National Company (FNC), of which McEwen is a wholly owned subsidiary. In addition, Washington owns 89½ percent of the voting stock of Washington Manufacturing Company (WMC), a jobbing and wholesale operation, which is McEwen's only customer. McEwen's entire production output consists of garments made to order, under a cost-plus contract, for WMC from materials provided by the latter. Thus, McEwen, in

(Footnote continued on following page.)

2. The Trial Examiner found, and we agree, that the Respondent's no-solicitation rule, being valid on its face,[3] was lawfully posted on May 20, 1966,[4] in order to maintain orderly and efficient production in the plant. Contrary to the General Counsel's contention, the record supports the Trial Examiner's finding that the rule was posted only after the Respondent noticed the quality and quantity of the employees' work had declined. In these circumstances, the fact that the rule was posted soon after the Union's organizing efforts began does not warrant an inference that its purpose and intent was to discourage union activities among the employees.[5]

3. We agree with the Trial Examiner's conclusion without, however, adopting his rationale, that the Respondent violated Section 8(a)(1) of the Act by plant president

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effect, functions merely as the production arm of WMC. In this posture, the latter is in a strategic position to dictate and control McEwen's production policies including, of course, wages paid McEwen's employees. Washington, presiding over WMC, FNC, and McEwen, controls and manages its subsidiaries through interlocking and overlapping boards of directors and corporate officers. Washington selects the directors of FNC who, in turn, pick the directors of McEwen. McEwen's president, vice-president, and secretary-treasurer are also directors of WMC. In addition, McEwen's vice-president and secretary-treasurer are officers and directors of FNC and Washington.

The executive offices of Washington, FNC, and WMC are located in the same building in Nashville, Tennessee. In Member Brown's opinion, these facts are distinguishable from those in the cases cited by his colleagues and amply support a finding that Washington exercises such control over the internal labor policies of McEwen as to render it a joint employer with McEwen and he would so find. *Freda Redmond and Sir James, Inc.*, 147 NLRB 1025; cf., *Phil Modes, Inc., etc.*, 159 NLRB 944, 947.

[3]No exception was taken to the Trial Examiner's finding that the rule was lawful on its face.

[4]Unless otherwise indicated, all dates are in 1966.

[5]Member Brown would find that the record establishes that this rule was promulgated for the unlawful purpose of frustrating employee exercise of Section 7 rights, since he views the evidence as indicating that Robertson looked for some work deviations when he learned of the union activities and "later" *found* the work was not "quite as good."

Pedigo's letter of July 14 and speech of July 26 to all employees. Unlike the Trial Examiner,[6] however, we base our conclusion solely upon the threatening remarks contained in these communications.[7] Thus, in both the letter and speech Pedigo recalled what happened to a particular manufacturing company in nearby Henderson, Tennessee, which closed soon after the employees there selected this Union to represent them. Pedigo's letter warned the employees that "this [closing the plant] could happen here [at McEwen] if a union is voted into this plant . . ." And, in his speech, Pedigo threatened that ". . . this Union will do the same thing for you . . . that the Union has done to the employees of [the closed plant in Henderson] . . . . We do not want that to happen. It will not happen if we have any control of the matter, but if the Union comes in the Company cannot be responsible for what happens . . ." In addition, Pedigo's letter warned the employees that if they select the Union to represent them, the Company might decide not to renew its lease with the City of McEwen for the land on which the plant is located, reminding them that the present lease would expire within a few months. We

[6]The Trial Examiner erred in considering himself bound by, and relying upon, the Board's findings sustaining objections in the prior representation proceeding, as his basis for concluding that Pedigo's speech of July 26 and letter of July 14 were violative of Section 8(a)(1) of the Act. It is well settled that the Board's findings and conclusions with respect to conduct alleged as objectionable in a representation proceeding are not binding upon the Trial Examiner in a subsequent hearing where such conduct is alleged as an unfair labor practice, since the issues are different in the two types of proceedings. Cf., *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786-1787.

[7]Member Brown would not fragmentize the letter and the speech but would find each unlawful in its entirety. In addition, Member Brown agrees with the General Counsel's contention that the Respondent also violated Section 8(a)(1) by Pedigo's speeches of May 24 and June 15, both of which stressed the futility of union representation and warned that unions bring nothing but trouble.

find that these remarks clearly threatened the employees with plant closure if they selected a bargaining representative, and that the Respondent thereby interferred with, coerced, and restrained the employees in violation of Section 8(a)(1) of the Act.

4. We also agree with the Trial Examiner that the Respondent, through its supervisors Robertson, Hargis, and Parchman violated Section 8(a)(1) of the Act by variously interrogating the employees about their union sympathies, threatening employees with economic reprisals if they selected the Union to represent them, promising them benefits if they refrained from supporting the Union, and making other derogatory remarks about union affiliation, all of which, we find, tended to interfere with, coerce, and restrain the employees in the exercise of their Section 7 rights. Unlike the Trial Examiner, however, we do not limit our findings to the separate incidents of supervisory interference detailed by him as items (a) through (i) of his conclusion. Rather, we view these incidents as merely illustrative of the extensive and widespread acts of interrogation and intimidation in which the Respondent's supervisors engaged, as more fully described in the Trial Examiner's recitation of facts, and base our conclusion upon the totality of the Respondent's conduct and the context in which the enumerated incidents occurred.[8]

5. The Trial Examiner recommended dismissal of the allegation that the Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the

[8]The General Counsel has excepted to the Trial Examiner's failure to make additional findings of 8(a)(1) violations on the basis of evidence appearing in the record. While we agree that the record contains evidence of other questionable conduct by the Respondent's supervisors, we find it unnecessary to pass upon or make such additional findings as they would, in any event, only be cumulative and, therefore, would not affect our remedial order herein.

Union on and after May 28,[9] because he concluded that the union's majority status on that date had not been established. Contrary to the Trial Examiner, we find that the Union was entitled to recognition on that date and that the Respondent's refusal to grant recognition and to bargain with the Union violated Section 8(a)(5) of the Act.

As more fully described in the Trial Examiner's Decision, the Union began its campaign to organize the Respondent's production and maintenance employees early in May and by May 28 it had obtained signed authorization cards from 109 of the 172 employees then in the bargaining unit. Of the 109 cards which were offered in evidence to establish the Union's claim of majority status, the Trial Examiner admitted 100 cards[10] in evidence as "seemingly valid." And, of the 100 cards thus admitted, the Trial Examiner found that 14 were invalid for one reason or another, and that the Union's claim of majority therefore had not been established. Thus, the Trial Examiner rejected nine cards as invalid because he found insufficient evidence to establish that these cards were signed for the purpose stated thereon, namely, to authorize the Union to act as

[9]We find no merit in Respondent's contention that June 23 rather than May 28 is the crucial date for determining the union's majority status because the Union repeated its bargaining demand in a letter which Respondent received on June 23. *Rea Construction Company*, 137 NLRB 1769, footnote 1 at 1770. Accordingly, we also find no merit in Respondent's contention that the authorization cards of employees who were working on May 28 but whose employment was permanently terminated thereafter should not be counted.

[10]At footnote 18 of his Decision, the Trial Examiner identified the nine cards which he refused to admit in evidence but does not state any reasons for his action. At the hearing the parties stipulated, however, that six of the cards were signed by employees whose employment was permanently terminated prior to the demand date. These cards were properly excluded. The General Counsel has excepted, however, to the exclusion of the cards signed by Fay Branch, Lula Smith, and Bessie Lou Capps. The record indicates, however, that General Counsel withdrew his offer of Capps' card, and did not subsequently reoffer it in evidence. The card signed by Smith is considered in the text below.

the employees' bargaining agent, and five cards because he found that the employees' signatures were insufficiently authenticated since the General Counsel did not call any of these employees as a witness and failed to account for his failure to do so. The Respondent has excepted for numerous reasons to the Trial Examiner's failure to find 42 other cards invalid for purposes of establishing the Union's majority. All cards in issue are discussed below and, to the extent possible, are considered together with others alleged to be invalid for the same or related reasons. The remaining 44 cards are not alleged to be invalid.

Signatory did not testify and authenticating witness is insufficient; printed signatures: The Trial Examiner rejected four cards as not having been properly authenticated,[11] i.e., those signed by Lemuel L. Palk, Eldton Bishop, Norma Jean Black, and William D. Shields, and excluded that of Lula Smith, on these grounds and the Respondent contends that 10 others[12] should be held unacceptable for the same reason. In addition, the Respondent has attacked the card of Mary M. McCaslin solely on the ground that the signature is printed. We find these 16 cards valid for the following reasons:

Palk's card was rejected because the authenticating witness, Ellen Betty Elliott, admittedly did not see Palk sign and he did not physically return the card to the solicitor. We find these facts immaterial in the circumstances herein. As found by the Trial Examiner, based on Elliott's uncontradicted testimony, Elliott gave Palk a blank authorization card which she asked him to sign; later, when she asked

[11]The Trial Examiner correctly rejected two other cards—that of Ruby Nell Christian because the evidence fails to establish that this card was signed on or before May 28 and that of Fay Branch because it is not established that she was considered to be on temporary leave for maternity.

[12]Annabelle Crowell, Joyce Dotson, Helen M. Larkin, Jackie Cook, Joslyn M. Smith, Gladys Hinson, Betty Ann Turner, Violet Bailey, Lola Craft, and Pearl Pate.

Palk for this card, he told her to get it from the glove compartment of his car. Accordingly, she took it from his car, at which time it had already been signed and the blanks thereon had been filled in, except that she inserted the name of the company and the job Palk held. The Board has long held that an authorization card may be properly authenticated by a person other than the signer and that the latter's absence as a witness need not be accounted for.[13] Thus, a card may be authenticated by a witness who testifies that he observed its execution,[14] but the Board will also accept as authentic any authorization cards which were returned by the signatory to the person soliciting them even though the solicitor did not witness the actual act of signing.[15] In this case, Palk not only returned the card in due course by telling Elliott where to pick up his card,[16] but he also thereby acknowledged any writing thereon as his own.[17] Nor is a card which is otherwise properly authenticated rendered invalid simply because the signer had not filled in all of the blanks when he turned it in to the Union.[18]

A card excluded from evidence by the Trial Examiner for similar reasons was that of Lula Smith. We find merit in the General Counsel's position that this card should have been admitted into evidence and counted as a valid designation of the Union. Bonnie Jane Brooks solicited employee Smith's signature and testified without contradiction that she personally witnessed Lula Smith's signing of

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[13] *Thrift Drug Company of Pennsylvania*, 167 NLRB No. 57; *Universal Metal Finishing a Division of C. A. Roberts Co.*, 156 NLRB 138, 146 (card of Sewards).

[14] *Thrift Drug Company, supra*, and cases cited at footnote 7 of the TXD.

[15] *Id.*, and cases cited at footnote 8 of the TXD.

[16] *N.L.R.B.* v. *Howell Chevrolet Co.*, 205 F. 2d 79, 85-86 (C.A. 9), enfg. 95 NLRB 410.

[17] *Verlin L. Pulley, et al., d/b/a Capitol-Varsity Cleaning Co.*, 163 NLRB No. 145 (card of Marjorie Maynor), enfd. in pert. part __ F. 2d __ (C.A. 6, June 5, 1968).

[18] *Ibid.* (Marjorie Maynor's card).

the card on the date indicated thereon.[19] She further testified, and it is undenied, that Smith's name and job title had been written on the card before it was returned, but she was unable to state with certainty that the Respondent's name appeared on the card when it was turned over to her. It was this uncertainty, coupled with the fact that Smith was not called to testify, that led the Trial Examiner to refuse to accept the card. However, in view of the general rules summarized above and cases cited in connection with Palk's card, it is patent that this holding was not warranted by these factors, either together or standing alone.

A similar question is raised with respect to the cards signed by the 10 persons listed in footnote 13, above. The Respondent contends these cards were insufficiently authenticated and should be held invalid for purposes of determining majority status because the individuals who signed the cards did not testify.[20] However, in each instance another employee who had solicited the signature testified without contradiction that she had seen the card signed on the date shown thereon, that the signatory then turned over the card to the solicitor, and that she (the solicitor) in turn gave the card to Agnes Hooper. As stated above, it is well settled that either the testimony of a witness to the signature, or the testimony of the solicitor that the card was returned in due course, is sufficient to authenticate the card for purposes of establishing its validity.

The Trial Examiner rejected, as insufficiently authenticated, the cards of Bishop and Black not only because they were not called to verify their signatures, but also because their names were printed on the cards in the space provided

[19] All parties had full opportunity to examine and cross-examine Brooks concerning the facts on which we rely.

[20] We note that the card of Annabelle Crowell, which is one of those with which we are concerned here, had the signer's name printed rather than written, but the Respondent has not attacked it on that basis as it has others discussed hereinafter. Rather, it relies solely on the failure of the signatory to testify in person.

for signature. Agnes Hooper testified that she gave Bishop a blank authorization card, which Bishop executed in her presence on May 11 by printing his name in the space provided for signature and thereupon returned it to her. Hooper admittedly wrote Bishop's name on the card above the words "Print your full name here." And, as to Black's card, employee Carolyn Betty testified that she gave a blank card to Norma Jean Black and that, when Black subsequently returned the card to her, Black's name had been printed in the signature space. Betty admittedly did not witness the execution of Black's card. In view of the foregoing uncontradicted testimony, we find that these cards are not rendered invalid by the fact that they bear printed signatures rather than being signed in script,[21] or by the fact that Bishop and Black were not called to testify, or by the fact that Black's signature was not witnessed.[22]

Another card which bears a printed signature and which the Respondent urges should be rejected for purposes of determining majority is that of Mary M. McCaslin. However, Mrs. McCaslin testified in person and identified her card and signature as having been completed on the date shown upon it. It is therefore clear that her card is not rendered invalid because she printed her name rather than writing it in script.

The final card in this group is that bearing the name "William D. Shields." The Trial Examiner rejected this card because that name did not appear on the Respondent's payroll for May 28 and because Shields' absence as a witness was not accounted for. However, we find that Shields' card was properly authenticated and may be counted in computing the Union's representative status. The record shows that a "Billy Shields" whose Form W-4 is signed "Billy D. Shields", was on the Respondent's payroll on the

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[21] *Verlin L. Pulley, et al., supra* (cards of Marjorie Maynor and Wilma Reidenbach).

[22] *Id.; Universal Metal Finishing, supra.*

critical date. Furthermore, Agnes Hooper testified, without contradiction, that employee Bobbie Shields gave William D. Shields a blank authorization card on May 10, and that the latter then filled in and signed the card in Hooper's presence. In view of this testimony, it was not fatal to the validity of Shields' card that he was not called personally to identify his signature. Nor does Respondent contend that "Billy D. Shields" is not the same person as "William D. Shields." Rather, Respondent challenged the validity of Shields' card on the ground that his employment was permanently terminated on June 6, before the Union's second demand for recognition and before the election of July 27. We have heretofore rejected the contention that cards signed by persons terminated after May 28 should not be counted.[23]

Employees who quit after May 28: The Respondent contends that 20 employees who signed cards[24] were no longer its employees at the time of the hearing, having voluntarily severed their employment relationship sometime after May 28 and that their cards must be rejected. Only one of these employees, Mary Profitt, is alleged to have quit prior to May 28. However, it is clear from the record that in the middle of May she learned that she was to have surgery performed and so informed the Respondent, but did not quit her job. The Respondent's payroll list of May 28 shows that she was carried as an employee, and its records show that she was terminated August 29. It is well settled that, the determination of a union's representative status must be based on whether it had been

[23]Footnote 9, *supra.*

[24]Mary Profitt, Diane Gray (Whitaker), Shirley Rickard, John Andrew Mallady, Jessie Marie Elliott, Alneita Rye, Jo Ann Parchman, Zella M. Tidwell, Fern Ann Turner, Bonnie S. Brown (Weatherley), Gloria J. Tidwell, Bonnie Jane Brooks, Agnes Hooper, Pearl F. Jones, Ruth W. Curtis, Margaret Geraldean Ross, Bonnie Page, Ethel Barnes, Bonnie Hooper, and Juanita Herbison.

designated as a representative by a majority of the employees on the payroll in the appropriate unit on the crucial date, and we have found that May 28, the date of the Union's initial demand, is the time as of which the finding must be made. Accordingly, it is clear that there is no merit to the Respondent's contention, and that these 20 cards signed by persons in the Respondent's employ on May 28 should be counted.

Signatory's intent to designate the Union not established; employees told or thought cards were for purpose of having an election: Included in this group are the nine cards rejected by the Trial Examiner and 10 attacked by the Respondent[25] on this basis.

The Trial Examiner appears to have assessed the validity of certain cards on the basis of whether the General Counsel had established the subjective intent of the signer.[26] In this respect, the Trial Examiner appears to have deviated from the principle that "an employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought that card meant cannot negative the overt action of having signed a card . . . ."[27] Thus, in the case of Pearlene Brooks' card, the Trial Examiner concluded that it could not be inferred that she signed it for the purpose of authorizing the Union to represent her. Brooks, however, testifying on Respondent's behalf, admittedly signed the card after personally filling in the blanks thereon, and she then returned it to the person who had solicited her signature. Under the circumstances, the fact that she may have been told that the purpose of the card was "to show that we might be interested in the Union" (which is in fact a fair representation of its purpose but in any event is far

[25]Sara Siler, Jennie Ethridge, Ruby Poston, Sue Lory, Patsy A. Hooper, Carletta Bernice Coram, Verlene Caballero, Vergie Ethridge, Mary Petty, and Mildred Curtis.

[26]See footnote 20 of the Trial Examiner's Decision, *infra*.

[27]*Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 744 (C.A. D.C.), cert. denied 341 U.S. 914, enfg. as modified 85 NLRB 1263.

from a statement that the card would not be used for the purposes stated on it), does not constitute probative evidence to negative her overt act of signing.[28] Accordingly, her card should be counted.

Since the Trial Examiner obviously applied an incorrect standard in determining the validity of the cards, it is necessary to re-examine the remaining eight rejected on this basis, as well as the 10 questioned by the Respondent.[29] Of these 18 cards, there are five as to which there is no assertion that any statement was made that the union card was for the purpose of an election, and one as to which the statement assertedly made was clearly overcome by other evidence showing nonreliance on that statement. Thus, Sara Siler testified that she was told that they "needed so many to send to the union"; without any reference to an election; Dorothy Parchman testified that she was told the card was "for an election of the Union"; Vergie Ethridge testified that she had no discussion with anyone concerning its purpose before signing the card, but she signed to have an election; Sue Lory testified that she read the card before she filled in the last three lines, including her signature, and "understood" that the card was to get an election; and Patsy A. Hooper testified that she knew it was a union card that she signed, but "thought it would be a union and if the election came you could vote the way you wanted to." Verlene Caballero testified that she was told that "if they had a certain percentage they could get an election at the plant." But in addition, she testified that she wanted to know what was going on and figured that if she joined she would know what was going on, thus indicating unequiv-

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[28] *Delight Bakery, Inc.*, 145 NLRB 893, 904, enfd., 353 F. 2d 344 (C.A. 6).

[29] The remaining 44 cards, admitted into evidence are not alleged by the Respondent to be invalid. As each was identified and authenticated on the record, we find that they may be relied on to determine the Union's representative status.

ocally that she signed for the express purpose of joining the Union. Caballero could not render her designation of the Union ineffective by a mental reservation, if she had one. Since each of these witnesses was testifying to her own subjective purposes or thoughts in signing, this testimony in this respect did not serve to negative the probative force of their own act of signing, and we therefore find these six are valid designations of the Union.

Of the remaining cards, five signatories (Carletta Bernice Coram, Mary Petty, Hazel Curtis, Ruth Pittman, and Margie Adams) each testified to the effect that when she was asked to sign she was told that they needed to get enough cards for an election, and seven (Margie James, Margaret Nell Frazee, Blanche White, Irene Buchanan, Jennie Ethridge, Ruby Poston, and Mildred Curtis) each testified to the general effect that she was told that they needed "so many cards" to get an election *and* there was no membership obligation as a result of signing, that they did not have to vote for a union even if they signed the card. Even under the most stringent tests, for the reasons set forth below, we are unable to conclude that under the circumstances here, where an election was held[30] in the context of widespread interrogation and threats by the Re-

[30]An election, pursuant to Stipulation for Certification upon Consent Election was conducted on July 27 in the following unit, which we hereby find to be appropriate:

> All production and maintenance employees of the Employer at its McEwen, Tennessee, plant, including the shipping clerk, the mechanics, the ticket and recut girl and the marker, but excluding the foreladies, cutting department foreman, all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

The Union lost that election by a vote of 96 to 60, and thereafter, filed timely objections to conduct affecting the election. The Region 1 Director, upon investigation, recommended that the objections be sustained. Exceptions to the Regional Director's report were duly filed and, on November 18, 1966, the Board issued a Decision and Order setting the election aside and directing a second election.

spondent, the cards of Coram, Petty, Hazel Curtis, Pittman, and Adams must be rejected. As to the latter seven, referred to above, we need not decide whether under our rationale, *infra,* these cards may properly be counted, inasmuch as the other cards found above to be valid total 92 and hence constitute a majority of the 172 employees in the unit on May 28.

The central inquiry in determining the effect to be given authorization cards is whether the employees, by their act of signing, manifested an intent to designate the union as their bargaining agent.[31] In assessing that intent, the wording of the card is of paramount importance. Where a card on its face clearly declares a purpose to designate the union, the card itself effectively advises the employee of that purpose, and particularly so where, as here, the form of the card is such as to leave no room for possible ambiguity.[32] An employee who signs such a card may perhaps not understand all the legal ramifications that may follow his signing, but if he can read he should and must be assumed to be aware at least that by his act of signing he is effectuating the authorization the card declares.[33]

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[31] *Levi Strauss & Co.*, 172 NLRB No. 57.

[32] Because the card here involved is forthright and unambiguous in its heading and text, the instant case is distinguishable for that reason alone from *N.L.R.B.* v. *Peterson Bros., Inc.*, 342 F. 2d 221 (C.A. 5), in which the Court was concerned with and based its decision on a card which it regarded as ambiguous on its face. And in *I.T.T. Semi-Conductors, Inc.* v. *N.L.R.B.*, F. 2d (C.A. 5, May 21, 1968), reversing in relevant part 165 NLRB No. 98, the court found the card even more ambiguous than the one in the *Peterson* case.

[33] For this reason, and in the absence of evidence that they were prevented from doing so, we find it immaterial that a number of the employees herein testified that they did not read the card before signing it. In any event, it seems inconceivable that in a campaign as vigorous as that carried on in this situation by both the Union and the Respondent the employees would be unaware of the nature of cards that were being distributed and they were being asked to sign. Cf. *Levi Strauss & Co., supra.*

Without ascribing to the signing of such cards all the solemnity and binding effect associated with such legal documents as deeds or contracts, we believe there is no valid basis in reason or law for denying face value to the signed cards, as in the case of other signed instruments, absent affirmative proof that the signing was a product of misrepresentation or coercion.[34]

Declarations to employees that authorization cards are desired to gain an election do not under ordinary circumstances constitute misrepresentations either of fact or of purpose.[35] That purpose, moreover, is one that is entirely consistent with the authorization purpose expressed in the cards as well as with the use of the cards to establish majority support. A point sometimes overlooked is that, in basic purpose, there is no essential difference between cards that are needed for a showing of interest to gain an election and cards that must be used to support a claim of majority designation in a Section 8(a)(5) unfair labor practice proceeding. The requisite showing under Section 9(c)(1)(A) that "a substantial number of employees . . . wish to be represented for collective-bargaining purposes . . ."

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[34]See, *Cumberland Shoe Corp.*, 144 NLRB 1268, and Order Amending Decision, January 13, 1964, enfd. 351 F. 2d 917 (C.A. 6). For other recent Court cases upholding that principle, see, e.g., *International Union, United Automobile Aerospace and Agricultural Implement Workers of America* v. *N.L.R.B. (Preston Products Company, Inc.)*, 373 F. 2d 671 (C.A. D.C., Nov. 14, 1967), enfg. 158 NLRB 322; *Amalgamated Clothing Workers of America* v. *N.L.R.B. (Sagamore Shirt Co.)*, 365 F. 2d 898, 906-907 (C.A. D.C.); *Happach* v. *N.L.R.B.*, 353 F. 2d 627 (C.A. 7).

Recent court decisions which have questioned the validity of the Board's principles concerning authorization cards include *N.L.R.B.* v. *Dan Howard Manufacturing Co.*, 390 F. 2d 304 (C.A. 7, January 12, 1968), 67 LRRM 2278; *Crawford Manufacturing Co.* v. *N.L.R.B.*, 386 F. 2d 367 (C.A. 4), cert. denied ___ U.S. (4/22/68); *N.L.R.B.* v. *Swan Super Cleaners*, 384 F. 2d 609 (C.A. 6); *N.L.R.B.* v. *Peterson Bros., Inc.*, 342 F. 2d 221 (C.A. 5); *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, 376 F. 2d 482, 486-487 (C.A. 5).

[35]*N.L.R.B.* v. *C. J. Glasgow Co.*, 356 F. 2d 476 (C.A. 7).

cannot be made by cards which simply request an election, but must be by cards stating the wish to be represented by the particular union. Such a requirement entails an expression of intent in all respects the same as that in a card which authorizes representation for bargaining purposes.

The fact that employees may be told that an election is contemplated or that the card will make an election possible does not in our view provide sufficient basis in itself to vitiate unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation that they will use such cards only for an election and subsequently seek to use them for a different purpose, i.e., to establish the union's majority independently. In such a situation the Board invalidates the cards for majority computation since the nature of the representation is such as to induce a conditional delivery for a restrictive purpose.[36]

We believe that this standard comports not only with sound legal principles but also with the realities of union organizational practices.[37] The Board's experience shows

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[36]The foregoing does not imply that a finding of misrepresentation is confined to situations where employees are expressly told in *haec verba* that the "sole" or "only" purpose of the cards is to obtain an election. The Board does not suggest such a mechanistic application of the foregoing principles, but looks to substance rather than to form. It is not the use or nonuse of certain key or "magic" words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation assures the card signer that his card will be used for no purpose other than to help get an election.

[37]With due deference to the view expressed by the U.S. Court of Appeals for the Fifth Circuit in its opinion in *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, 376 F. 2d 482, 486-487, until the matter has been passed upon by the U.S. Supreme Court, we are unable to concur that our approach applies too lax a standard or that when cards are "challenged because of alleged misrepresentations in their procurement" the Board must probe "into the subjective intent of the challenged signers." Such a standard is at

(Footnote continued on following page.)

that in nearly all organizational situations unions expect to, and do, proceed via the election route in their effort to gain representation rights, and they obtain designation cards with the thought of using them first in the preliminary step to obtaining recognition, i.e., to make the showing of interest required for the processing of a representation petition. It is therefore only to be expected that there will be considerable discussion during an organization campaign of a contemplated representation proceeding and of the need for sufficient authorization cards for that purpose. Indeed, it would be surprising if no such mention were made. It is in the exceptional and relatively infrequent situations in which an employer by his unfair labor practices has made a fair election impossible.[38] that unions with a card majority resort to 8(a)(5) complaint proceedings in an effort to establish their right to representation—in fact, that avenue is normally closed to unions unless substantial independent unfair labor practices have occurred.[39] We

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odds with a long line of judicial authority holding that in the absence of clear proof of fraud or coercion, full effect must be given a clear authorization card regardless of the subjective state of mind of the signer. See, e.g., *N.L.R.B.* v. *Fosdal*, 367 F. 2d 784, 786-787 (C.A. 7); *N.L.R.B.* v. *Gorbea, Perez & Morrell*, 300 F. 2d 886, 887 (C.A. 1); *Joy Silk Mills* v. *N.L.R.B.*, *supra*; *Furr's Inc.* v. *N.L.R.B.*, 381 F. 2d 562 (C.A. 10). To open up avenues of proof of subjective intent would create strong temptations to induce employees to assert a retroactive repentance or disavowal which would not be subject to the normal evidentiary checks on truth or falsity. In this connection, see, e.g., the discussion by the Court in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW* v. *N.L.R.B. (Preston Products Company, Inc.)*, 373 F. 2d 671 (C.A. D.C., Nov. 14, 1967), enfg. 158 NLRB 322.

[38] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. 185 F. 2d 732 (C.A. D.C.), cert. denied 341 U.S. 914.

[39] This is borne out by the Board's case statistics. In Fiscal Year 1967, for instance, the Board conducted 8,116 elections. Contested cases in which union majority was determined by cards, apart from elections, numbered 157—about 1.9 percent of the number of elections conducted. Of the aforesaid 157 cases, all but 16

(Footnote continued on following page.)

perceive no valid reason for refusing in a complaint proceeding to accord the usual probative value to unambiguous authorization cards simply because at the time the union still thought it could participate in a fair election it may have stressed the election use of the cards rather than the alternative use to which they were later put. As noted above, there is no conflict or contradiction in purpose between the use of cards to make a showing of interest in election cases and their use to establish majority in the limited situations arising under the *Joy Silk* doctrine. Absent some other disability, their use, or proposed use, to secure an election does not alter their essential character as designations of the union to act as collective-bargaining representative. To hold otherwise would only result in allowing an employer to profit from his own unfair labor practices and thereby frustrate statutory policy.

In this case, as noted above, we have found that there was no direct or indirect representation to the card signers whose cards we have counted toward the majority that the only purpose of the cards was to get an election. We have further found that other matters relied upon by the Respondent do not invalidate the cards. Accordingly, we conclude that the Union represented a majority of the employees at the time it demanded recognition, and that the Respondent violated Section 8(a)(5) in refusing to grant such recognition.

The Remedy.

As we have found that the Respondent has engaged in additional violations of the Act, which go to the heart of the Act, and that these violations have been extensive and

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involved situations where a fair election was made impossible or was invalidated by employer unfair labor practices. These 157 cases were not only those in which Board Decisions issued, but included all such cases, whether closed by informal or formal settlement agreement in the Region, by Trial Examiner recommendation, by Board-Order, or by court decree.

prolonged, we deem it appropriate to issue a broad cease and desist order in place of the narrow one recommended by the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, McEwen Manufacturing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union membership, activities, or sympathies, to discourage their membership in, or support of, Amalgamated Clothing Workers of America, AFL-CIO, in a manner constituting interference, restraint, or coercion within the meaning of Section 8(a)(1);

(b) Threatening to close down the plant or engage in other reprisals if the employees engage in union activities or if a majority of the employees select the above Union, or any other labor organization, as their collective-bargaining representative;

(c) Refusing to recognize and bargain collectively with Amalgamated Clothing Workers of America, AFL-CIO;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist Amalgamated Clothing Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with the above-named Union as the exclusive representative of the employees in the following unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and, if an understanding is reached, embody the same in a signed agreement. The bargaining unit is:

> All production and maintenance employees at the McEwen Manufacturing Company plant at McEwen, Tennessee, including the shipping clerk, the mechanics, the ticket and recut girl and the marker, but excluding the foreladies, cutting department foreman, and all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

(b) Post at its plant in McEwen, Tennessee copies of the attached notice marked "Appendix."[40] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 10 days from the date of this Decison, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., July 3, 1968.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
(Seal) National Labor Relations Board.

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[40]In the event that this Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

APPENDIX.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

Following a trial in which the Company, the Union, and the General Counsel of the National Labor Relations Board participated and offered their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice and to abide by what we say in this notice.

WE WILL NOT interrogate our employees concerning their union membership, activities, or sympathies, to discourage their membership in or support of AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, or any other labor organization, in a manner constituting interfetence, restraint, or coercion within the meaning of Section 8(a)(1).

WE WILL NOT threaten that the plant will close down, or that you will lose your jobs, or that other reprisals will be taken if you engage in union activities or if a majority of the employees select a union to represent them.

WE WILL NOT refuse to recognize and bargain collectively with AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO.

WE WILL, upon request, bargain collectively with AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, as the exclusive representative of our employees in the following unit with respect to rates of pay,

wages, hours of work, and other terms and conditions of employment, and, if an understanding is reached, we will put it in writing and sign it.

The bargaining unit is:

All production and maintenance employees at the McEwen Manufacturing Company plant at McEwen, Tennessee, including the shipping clerk, the mechanics, the ticket and recut girl and the marker, but excluding the foreladies, cutting department foremen all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization.

McEWEN MANUFACTURING COMPANY,
(Employer)

Dated..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee, 38103 (Tel. No. 534-3161), if they have any questions concerning this notice or compliance with its provisions.

ERRATA.

The Board inadvertently omitted certain language from the first full paragraph on page 15 of its Decision and Order,[1] as issued on July 3, 1968. Accordingly, we hereby correct the said Decision as follows:

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[1]172 NLRB No. 99.

(1) On page 15, line 7, immediately before the sentence beginning with the phrase "Accordingly, we conclude . . ." insert:

> As we have shown, *supra,* after the Union made its demand for recognition, Respondent engaged in unfair labor practice conduct designed to induce employees to abandon their support of the Union. Such conduct demonstrates that, in fact, Respondent refused to bargain and filed a representation petition not because it had a good faith doubt as to the majority status of the Union, but in order to gain time within which to dissipate the Union's majority and, thereby, to evade its statutory obligation to recognize and bargain with the Union.[40] We find, moreover, that the unlawful conduct made impossible the holding of a free election and that, consequently, "the Board has no alternative but to look to signed authorization cards as the only available proof of the choice employees would have made absent the employer's unfair labor practices."[41]

(2) On page 15, at the end of the first full paragraph delete the period and insert the words "for unlawful reasons."

(3) Add the following new footnotes 40 and 41 on page 15, and renumber the existing footnote 40 on page 16 as footnote 42:

Dated, Washington, D. C., August 15, 1968

By direction of the Board:

George A. Leet,
Associate Executive Secretary.

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[40] *Joy Silk Mills, supra.*

[41] *Bryant Chucking Grinder Co.*, 160 NLRB 1526, 1530, enfd. 389 F. 2d 565 (C.A. 2), cert. denied U.S. , 88 S. Ct. 2055; *New England Liquor Sales Co., Inc.*, 157 NLRB 153, 164.

TRIAL EXAMINER'S DECISION.

Statement of the Case.

GOERLICH, Trial Examiner: On June 15, 1966, a petition for an election was filed by McEwen Manufacturing Company sometimes referred to herein as McEwen. On July 8, 1966, a Stipulation for Certification Upon Consent Agreement was executed by the Amalgamated Clothing Workers of America, AFL-CIO, herein referred to as the Union, and McEwen. On July 27, 1966, a Board-conducted election was held among McEwen's employees; 60 ballots were cast for the Union, 96 ballots were cast against the Union, and 1 ballot was challenged. On August 3, 1966, objections to conduct affecting the results of the election were filed by the Union and on September 2, 1966, a report on objections was issued by the Regional Director for Region 26 recommending that the election be set aside and that a new election be directed. McEwen and the Union filed timely exceptions with the Board to the report on objections. On November 18, 1966, the Board issued a Decision and Order setting aside the election conducted on July 27, 1966, and directing a second election.

In its Decision, Order, and Direction of Second Election, the Board, for the reasons set forth in the Regional Director's report, adopted the Regional Director's findings and recommendations.[1]

On November 10, 1966, the Union filed an unfair labor practice charge and on December 7, 1966, it filed a first amended charge. Upon these charges the General Counsel for the National Labor Relations Board (herein called the Board) on behalf of the Board by the Regional Director

[1]The Regional Director, among other things, found "that by its letter of July 14 or 15 and the speech of Pedigo on July 26, the Employer created an atmosphere of fear in which the free expression of choice of the employees was rendered impossible."

for Region 26 on December 30, 1966, issued a complaint and notice of hearing naming McEwen Manufacturing Company and Washington Industries, Inc., as the Respondents. In the complaint, it was alleged that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act.[2] The Respondents, by answers timely filed, denied that they had engaged in or were engaging in the unfair labor practices alleged.

Hearing was held at Waverly, Tennessee, on February 7 through 10, and 13 through 17, 1967, and at Nashville, Tennessee, on April 7, 1967. At the hearing each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally upon the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been reviewed and considered by the Trial Examiner.

Issues submitted to the Trial Examiner were:

1. Whether Respondents Washington Industries, Inc., and McEwen Manufacturing Company are and have been a single integrated enterprise with Respondent McEwen Manufacturing Company being an affiliate of Washington Industries, Inc., with common ownership and management and labor relations policy.

2. Whether Respondents violated Section 8(a)(1) of the Act by: Promulgating and maintaining on the bulletin board at the McEwen plant a no-solicitation rule; interrogating its employees; threatening employees with loss of jobs, plant closure, and less desirable working conditions; and stressing to employees the futility of selecting the Union as their collective-bargaining representative.

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[2] Among other things it was alleged in the complaint that the Respondents violated the Act by Pedigo's speech of July 26, 1966, and the letter of July 14, 1966, referred to in footnote 1.

3. Whether Respondents violated Section 8(a)(5) of the Act by refusing to bargain with the Union after the Union had been designated by a majority of Respondents' employees in an appropriate unit as their representative for the purposes of collective bargaining.

Upon the whole record and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact and Conclusions.

I. The Business of the Respondents.

Respondent, McEwen Manufacturing Company, is now and has been at all times material herein a Tennessee corporation engaged in the manufacture of overalls and dungarees at its plant located at McEwen, Tennessee.

During the past 12 months Respondent, McEwen Manufacturing Company, in the course and conduct of its business operations, purchased and received at its McEwen, Tennessee, location materials and supplies valued in excess of $50,000 directly from points located outside the State of Tennessee, and during the same period manufactured, sold, and shipped overalls and dungarees valued in excess of $50,000 from its McEwen location directly to points outside the State of Tennessee.

Albert Pedigo is the president of Respondent McEwen Manufacturing Company, R. Hicks Clark is the vice president, and Paul A. Hargis is the secretary-treasurer. These three persons compose the board of directors. McEwen's sole customer is Washington Manufacturing Company, with which it has a cut-and-make contract. Washington Manufacturing Company, a wholesaler and jobber, furnishes the materials which are used for the manufactured garment for which it is charged on a cost-plus basis. Pedigo holds preferred stock in Washington Manufacturing Company. Respondent Washington Industries, Inc., owns 89½ percent of the voting stock of Washington Manufacturing Company and all the voting stock of First National Company, of

which McEwen Manufacturing Company is a wholly owned subsidiary. First National Company and Washington Industries, Inc., have common directors and officers. Hargis and Clark are respectively the treasurer and secretary of Washington Industries, Inc. Both are on the board of directors. Other members of the board of directors of Washington Industries, Inc., are G. L. Comer, chairman of the board, T. W. Comer, president, E. H. Hatcher, vice president, and B. Hatfield, vice president. Hargis' office is located in the 200 block of Second Avenue in Nashville, Tennessee, where also are located the offices of other officers and members of the board of directors of First National Company and Washington Industries, Inc. By reason of this proximity Hargis was frequently in the association with the officers and directors of First National Company and Washington Industries, Inc. On occasion, affairs at McEwen were discussed which included the advent of the Union. However, Hargis testified that he sought no advice in respect to how McEwen should treat with the Union although he kept several of the directors of Washington Industries, Inc., up to date on what was happening at McEwen.

Washington Industries, Inc., engages in no activities other than the ownership of stock.

Thomas M. Robertson is the plant manager at the McEwen plant and supervises its day-to-day operations. Pedigo, who resides at Scottsville, Kentucky, visits the McEwen plant 2 to 4 hours a week. Pedigo is the highest executive officer of McEwen.[3] There is no direct evidence that Washington Industries, Inc., which exists as a holding company only, administered or formulated "a common labor relations policy affecting the employees" of McEwen Manu-

[3]He described his functions, "I'm a consultant with Mr. Robertson. I try to help him down there."

facturing Company. On the other hand, Hargis testified that McEwen's board of directors sought to solve the problems of the corporation by themselves.

What was stated by the Board in *M. Lowenstein & Sons, Inc.*, 150 NLRB 737, footnote 2, is apposite:

> Lyman, doing business in South Carolina, is one of the wholly owned subsidiaries of Lowenstein, which is located in New York. Its chief executive officer is a vice president and the general manager who holds no positions with Lowenstein. There is no common board of directors or integration of operations. They do not have a centrally controlled or common labor relations policy and Lowenstein is not involved in the day-to-day operations of Lyman or otherwise involved in setting wages, hours, working conditions, or any other terms of employment of Lyman's employees, nor was it involved in any way in the commission of the unfair labor practices found herein. Upon the entire record, we find merit in Respondents' exception and shall dismiss the complaint as to Lowenstein.

Accordingly, the motion to dismiss of Washington Industries, Inc., is granted and the complaint is dismissed as to the Respondent, Washington Industries, Inc.

The Respondent, McEwen Manufacturing Company, admits and the Trial Examiner finds that at all times material herein Washington Industries, Inc., has been and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

Amalgamated Clothing Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

A. The Alleged Violations of Section 8(a)(1) of the Act.

1. The no-solicitation rule posted on May 20, 1966.

On May 20, 1966, Plant Manager Thomas H. Robertson posted the following rule:

> There will be no solicitation of any kind, on the plant premises by an employee during working hours.
>
> There will be no distribution of any literature, notices, cards or paper of any kind in and about the work areas of any employee at any time. Non-employees shall not come upon or be upon the plant premises for the purpose of making solicitations or distributing literature, notices, cards or paper of any kind.
>
> Exceptions will be allowed to the above rules if approved in writing by the plant superintendent.

Robertson testified that sometime during the second week of May 1966, he received a telephone call from an employee advising him that union activity was occurring. Thereafter, he noticed that female employees frequented the restroom more often than they had in the past and were journeying in groups. He also observed increased visiting at the employees' machines. According to Robertson, he also began to notice that "the quality of the work wasn't quite as it was." Because of the situation he observed, Robertson testified that he caused to be posted the rule set out above.

The General Counsel makes no claim that the rule is illegal *per se*. His claim is that it was published "during the union's organizational campaign in order to discourage union membership activities."

The Supreme Court has said in *N.L.R.B.* v. *United Steelworkers of America (Nutone Inc.)*, 357 U. S. 357, 361, "Em-

ployer rules prohibiting organizational solicitation are not in and of themselves violative of the Act, for they may duly serve production, order and discipline." Here the uncontradicted evidence establishes that the rule was posted in response to interference with production and a diminution of the quality of work performed. The validity of a rule promulgated and posted under such circumstances is not impaired because a secondary effect might result in the impeding of union organization, for such result to some degree must always follow from any valid rule. The no-solicitation rule being valid on its face could be lawfully posted where union activities as here were interfering with production and the quality of the employees' work. Under such circumstances secondary effects resulting in the prevention of unrestrained union activities is in nature, *damnum absque injuria*.[4]

2. President Pedigo's speeches of May 24, June 15, and July 26, 1966, and the letter of June 14, 1966

On May 24, June 15, and July 26, 1966, President Pedigo addressed Respondent McEwen's employees on company time and property. In his May 24 speech among other things Pedigo advised ". . . this Company does not want a union, will fight the union coming in this plant." Again in his June 15 speech Pedigo said, ". . . I repeat, not only is this Company opposed to the Union, but we will do everything that can be done under and within the law to keep a Union out of this plant." Pedigo ended his July 26 speech

[4] *Ward Manufacturing, Inc.*, 152 NLRB 1270, cited by the General Counsel, is distinguishable from the instant case in that in such case there was an "absence of any evidence that any disruption had occurred." In the other case cited by the General Counsel, *Quality Production Company*, 162 NLRB No. 141, the Trial Examiner found that "no particular incident [other than union activity] precipitated the promulgation of the rules." In the instant case it is uncontradicted that an interference with production was occurring.

with "Again, with all the sincerity that I have, I ask you to vote 'NO'."

A letter signed by Pedigo and Manager Robertson was mailed to employees on July 14, 1966, in which, among other things, appeared, "We ask you to help yourselves and at the same time help us by voting 'NO' when you mark your *secret* ballot on July 27."

In reviewing Pedigo's speech of July 26 and the letter of July 14 the Regional Director in his report on objections said:

> After careful reading and consideration of the letter and speech it is found that the main theme of the Employer's campaign was the futility of selecting the Union as the collective bargaining representative, and the dire consequences which might be expected. Thus, the opening thrust of the letter voices the Employers opinion that the Union would not help the employees or the Company and expresses the firm belief ". . . that the Union will hurt you and it could destroy us—that is just how serious this matter is." (Underlining supplied.)
>
> Both appeals to the employees emphasized the Union's inability to do more than make promises and stress the fact that only the Employer could grant benefits. These appeals were so worded as to convey the message that the Union's request would fall on deaf ears, and only by striking could the Union's attempt to make good on it's promises. Having impressed upon the employees the idea that a strike was probable rather than just a possibility if the Union were selected, the Employer raised the spectre of plant closing, with pointed reference to the recent closing of a plant in a nearby city after organization by the Union. The reference to the company's intent to renew its lease contained a proviso which warned the employees that the

Union might make conditions such that the Company would not feel justified in renewing its lease, but failed to indicate what type of conditions would so influence the decision. Under these circumstances it is found the latter intended to, and did, convey the message that the mere selection of the Union would cause the Employer to decide not to renew its lease and to discontinue its operation.

In view of the foregoing, it is found that by its letter of July 14 or 15 and the speech of Pedigo on July 16, the Employer created an atmosphere of fear in which the free expression of choice of the employees was rendered impossible, and merit is found to this objection.

The Board adopted the Regional Director's findings and recommendations in these respects "for the reasons set forth in his report" with the footnote, "Member Fanning would rely only on that part of the preelection statements wherein the Employer in effect threatened not to renew its lease and to discontinue its operations in the event the Union won the election."

The speech and letter were both before the Board in the representation case. From their context the Board drew certain factual and legal conclusions. In this respect the speech and letter were fully considered and litigated. Moreover the same parties were before the Board in the representation case. As to matters litigated in a prior representation case, "it is established Board policy, in the absence of newly discovered or previously unavailable evidence not to relitigate issues which were or could have been litigated in a prior related representation proceeding." See *Hollywood Brands, Inc.*, 163 NLRB No. 107, and cases therein cited. Accordingly the Trial Examiner deems himself bound by the findings and legal conclusions of the Board in the prior related representation case.

The findings and conclusions of the Board which sustained the objections to the election likewise sustain, in the light of the record as a whole, a finding that Respondent McEwen also violated Section 8(a)(1) of the Act by Pedigo's speech of July 26, 1966, and the letter of July 15, 1966.

3. The alleged misconduct of Plant Manager Thomas M. Robertson, Supervisor Edna Hargis, and Supervisor Ova Lee Parchman

Thomas M. Robertson: Thomas M. Robertson had been the plant manager of Respondent McEwen Manufacturing Company for over 15 years. He lived next door to the plant in the city of McEwen, Tennessee, which had a population of about one thousand persons. McEwen was the principal industry in the city. He had been elected mayor for two terms at McEwen and also served on the school board. McEwen commenced operations in 1947.

About the second week in May 1966, one of the McEwen employees called Robertson by telephone at his home and told him there was some union activity going on. After this telephone call, Robertson observed that larger groups of employees were going to the restroom, more time was being spent in talking at machines and the quality of the work was not as good as it had been.

Robertson discussed this situation with Pedigo, and recommended that the no-solicitation notice above referred to be posted. The notice was posted on May 20, 1966.

According to Robertson, he became concerned and began thereafter to check with the employees.[5]

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[5]Robertson testified:

So I began to check with the employees and ask them if—just casually—if they were getting along all right; were they having trouble, and so forth. About if the union activity was—some of them I told I heard the union was being organized, or something to that effect. So I just would ask them if all

(Footnote continued on following page.)

On May 24, 1966, Pedigo addressed the employees. After Pedigo made this speech Robertson talked to more and more of the employees about the union situation. Robertson advised these employees that the employer "definitely did not want any union" and that the employer "could do as good for them as the union could." From these conversations[6] Robertson said he received the response that "everybody just seemed perfectly happy."

Among the employees whom Robertson visited was Zella May Tidwell with whom he conversed around June 13, 1966. Robertson came to her machine and told her he wanted to talk to her about the union situation, saying that she knew more about unions because she had worked in union factories and knew a little more about the situation than others. He further said that some of the employees had worked in the factory for several years and that had been the only job they had done. He told her that unions in bigger factories were all right where they didn't see their supervisors every day but with small factories where the supervisors were with the employees every day any difficulty could be ironed out that came up. He told her that he had done her several favors in the past and he thought she ought to do him one in return. He asked her if there was going to be an election. She told him she did not know,

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was all right; if they was happy on their jobs; if they're satisfied like they was working. I didn't get no response, so everything was all right.

[6]Robertson testified:

Well, usually I would go up to them and of course knowing them like I did, I would speak to them and chat with them, and maybe tell them I would like to talk to them about the union. It was after the speech; it was definite we didn't want any union, that was sure. . . . We definitely didn't want any union and of course they understood that, I was sure of that. And I would tell them that we thought we could do as good for them as the union could, and I certainly wanted them to make up their minds and I wanted them to vote like they thought was best, but I hoped they would vote against the union.

that she had not been notified that there would be one and she didn't know whether there would or would not be an election. He told her then to think the situation over and he hoped that when it came to an election she would vote "No." He further told her that whichever way it went, and in any event, he wanted her to know he was her friend. He told her that the Company would not stand for the Union and that "if the union come in [they] might lose [their] factory."

While Robertson denied the foregoing credited facts he testified that he told Tidwell that he "didn't want any union" and that he thought that "the Company would do better for the employees than the union could do."[7]

Robertson also conversed with employee Ellen Elliott at her machine on June 13, 1966. Robertson said that he heard that the Union claimed that a majority of the employees had signed union cards. He said that it would be "put to a vote." He further said he would "like" for her to "think it over" and "try to see his side" and that if only the Washington, D. C., company was involved they could close the plant, but since they had contracts with other companies, they would not let them close. The Union, however, could force them out on a strike. He also told her that however she voted, they had always been friends and would still remain friends, and if she needed her check early, he would see if he couldn't get it to her at any time.

Robertson likewise talked with employee Nancy Elliott[8] on June 13, 1966. Elliott's testimony in respect to the conversation (which is credited) is as follows:

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[7]Having carefully observed the witnesses while testifying and in view of the fact that statements attributed to Robertson follow a definite pattern, and tend to contribute to McEwen's efforts to defeat the Union, an effort which Robertson was sponsoring, the Trial Examiner has credited witnesses whose testimony conflicts with that of Robertson.

[8]In evaluating Nancy Elliott's testimony the Trial Examiner has taken into consideration that her direct testimony was a

(Footnote continued on following page.)

Mr. Robertson, he said, "Nancy, I would like to talk to you about the union." He said that if the union comes in there is liable to be trouble and you couldn't say you hadn't been warned. He said, "although you don't remember it, but a union has been around before and all it caused was trouble. The company has been good to you and we know you want to work, and you will work because the company has plenty of work. The only way you wouldn't get to work would be the union came in and the plant would go out of business."

He said, "Of course if it would have been up to Washington Manufacturing Company, that they would have closed down at the first whisper of a union, but at the present we have contracts with Red Ball and Big Buck and they won't let us close." He said, "It is easy for anyone to sign a card, but the voting is what counts so think it over and vote no."

Robertson also visited with employee Bonnie Sue (Brown) Weatherby at her machine.[9] Robertson said that he was sure she had "heard of the plant closing" but that this was "not true"; that the "only way the plant would close" was for the "Union to come in and pull a strike." He said that if the "Union came in it would not only mean that the people in the plant would lose their jobs, but he would lose his also." He further remarked that he had his home in McEwen and that Weatherly was young and could "get a job somewhere else, but there was older people in the plant who couldn't do this."

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memorization of her affidavit given to a Board agent. At the time she gave her affidavit she had access to notes which she had prepared immediately after the conversation with Robertson. These notes were made available to the Respondent's counsel at the hearing but were not used to impeach the testimony of Elliott.

[9]Weatherly, a sister of Nancy Elliott, also memorized her affidavit. The Trial Examiner has not considered that such fact reflects adversely upon the credibility of Weatherly.

Weatherly asked Robertson whether the majority of the employees had signed cards. He answered that it was true. Robertson further commented that he had been "good" to Weatherly and that when she asked him for another job he gave it to her.

A few days after Eunice Little signed her union card,[10] Robertson approached her at her machine. He asked her whether she had signed a union card. She answered in the affirmative. Robertson then said, ". . . we don't have any union here; we don't want no union here and if it comes to a union, the company will fight it. . . . it would come to a law suit and it would be a long drawn out affair and we would be out of work because of it."[11]

Supervisor Edna Hargis: About 20 employees worked under Supervisor Hargis, one of whom was Gloria Tidwell. Hargis held two conversations with Tidwell at her machine on June 18, 1966. During the first conversation Hargis asked Tidwell what she thought of the Union and Tidwell told her she wasn't against it. Hargis then asked her what was the one thing the Union could do for them and Tidwell answered that she thought the Union was all right.

On the afternoon of the same day at or about 1:15 p.m. Hargis again came to Tidwell's machine and said she was talking to Tidwell as a friend. She asked Tidwell if she had read the letter that the Company sent to all of its employees. Tidwell told her that she had read the letter. Hargis said that she had worked for the Company for several years and that "she knew the company wouldn't stand

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[10]Eunice Little signed her union authorization card on May 11, 1966.

[11]Robertson admitted that he had talked to Little about the Union. He testified:

> Well, I told Eunice that it looked like they were going to have an election for a union—a union election possibly—and I wanted to talk to her a minute about it; that when the time comes to vote I wanted her to make up her mind; and also I told her that I thought that we, the company—I might have said we—could do as much for her as the union could do.

to have a union come in." Hargis further said that where the employees had steady work now there would be less chance of having steady working conditions if the Union came in and that if the Union called them out on strike, there would be a "possibility" that the girls wouldn't have their jobs when they came back. Hargis suggested that Tidwell think it over and think over what the letter said. Hargis then asked whether there was anything the Union could do for the employees. Tidwell responded that "there were several things it could do for us." Hargis repeated that "the Company wouldn't stand to have a union."[12]

Supervisor Ova Lee Parchman: Supervisor Parchman has worked for McEwen for 10 or 12 years and presently supervises approximately 25 employees. Employee Sarah King worked for her with whom she discussed the Union on June 3, 10, and 17, 1966.[13]

The first conversation occurred shortly after Pedigo's speech of May 24. In the course of the first conversation Parchman asked King how she felt about Pedigo's speech. King asked what she meant. Parchman replied, "The Union." King responded, "I am for it 100%." Parchman said, "Oh Ella . . . I thought you were otherwise." Im-

[12]Hargis denied conversing with Tidwell about the Union. She testified that part of her job was to check the employees' work daily for which purpose she visited the employees' machines. According to Hargis during the 20 years she was supervisor she never talked to employees while "around their machines . . . about matters not relating to work." The implausibility of such circumstance occurring, as well as the demeanor of Hargis while testifying, persuades the Trial Examiner that Hargis was not a credible witness.

[13]Parchman denied the testimony of King which is credited. In view of Robertson's extensive and open contacts with employees during the union organizational campaign, which were readily observable, and the thrust of the McEwen's antiunion campaign, it seems likely that Parchman would have conversed with King and made the remarks attributed to her. For this reason the Trial Examiner has resolved credibility in favor of witness King. Demeanor has been evaluated.

mediately thereafter Parchman was seen talking to Manager Robertson.

The second conversation took place at the banding machine. Parchman said she wished the "girls would get to work," to which King replied that she was working her "tail off"; Parchman said she did not mean King, Parchman added, "Did you know that there won't be any time that we won't have a plant here?" and that "any girl that signed a union card should starve to death." Parchman also said that "in a little while [the plant] would be closed just like the plant at Waverly" and that the plant had continued about as long as "we could have it."

The Trial Examiner finds that apropos of the environment created by the Respondent's antiunion campaign, the Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act and thereby violated Section 8(a)(1) as follows:

(a) Robertson unlawfully interrogated employees as to whether "they were getting along alright" or "were having trouble" and "if they were happy in their jobs—if they're satisfied like they were working."[14]

(b) Robertson unlawfully impressed employees with the futility of selecting the Union, to wit: ". . . we thought we could do as good for them as the Union could."[15]

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[14]The interrogations herein found to be unlawful, coming at the beginning of a union organizational campaign among McEwen's employees, were clearly initiated in order that McEwen could elicit important information most useful to it in formulating a program whereby it could draw its employees away from union affection. Such interrogations which encroached upon priviledged union matters served no legitimate employer purpose and reasonably tended to restrain or interfere with employees in the exercise of rights guaranteed by Section 7 of the Act. See *Jefferson Wire and Cable Corp.*, 159 NLRB No. 107.

[15]In *The Trane Co.*, 137 NLRB 1506, 1510:

> There is no more effective way to dissuade employees from voting for a collective bargaining representative than to tell

(Footnote continued on following page.)

(c) Robertson unlawfully interfered with the right of self-organization when he mentioned to employee Zella May Tidwell that he had done her favors in the past and he thought she ought to do him one in return; Robertson unlawfully interrogated Tidwell as to whether there was going to be an election; Robertson unlawfully threatened plant closing when he stated that "if the Union came in [they] might lose [their] factory"; and Robertson unlawfully impressed Tidwell with the futility of selecting a union by his admitted statement that "the Company would do better for the employees than the Union could."

(d) Robertson created the impression of the promise of a benefit in the light of his other remarks when he told Ellen Elliott that if she needed her check early he would see if he couldn't get it to her at any time.

(e) Robertson threatened plant closing by asserting to Nancy Elliott that the "only way you won't get to work would be if the Union came in and the plant would go out of business."

(f) Robertson unlawfully threatened employee Weatherly with loss of employment if the Union prevailed by stating, in the context used, that if the Union prevailed "people would lose their jobs" and he "would lose his also," and Robertson interfered with rights of self-organization when he said to her that he had been "good" to her and that when she asked him for another job he had given it to her.

(g) Robertson unlawfully interrogated employee Little as to whether she signed a union card; Robertson unlawfully threatened reprisal by asserting that if the Union

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them that their votes for such representative will avail them nothing.

In *N.L.R.B.* v. *Bailey Co.*, 180 F. 2d 278, 279 (C.A. 6):

An employer interferes with the right of self-organization when he emphasizes to his employees that there is no necessity for a collective bargaining agent.

prevailed "it would come to a law suit" and that employees "would be out of work because of it."

(h) Supervisor Hargis unlawfully interrogated employee Gloria Tidwell as to what she thought about the Union and what the Union could do for the employees; Hargis impressed Tidwell with the futility of employees' choosing the Union by the statement that the "company wouldn't stand to have a union come in" and that there would be less chance of having steady working conditions if the Union prevailed.

(i) Supervisor Parchman unlawfully interrogated employee King as to how she felt about the Union. Parchman unlawfully threatened reprisal when she stated that "in a little while" the plant "would be closed" and girls who signed union cards "should starve to death."[16]

B. The Alleged Violation of Section 8(a)(5) of the Act.

1. The showing of interest.

On May 4 and 9, 1966, the Union held joint organizational meetings of McEwen and Waverly Garment Company, Inc., employees. Employees from both plants were present. Cleron B. Smith, union area director, addressed both meetings. Smith advised the employees present "to hurry up and get people signed up." Blank union authorization cards were given to the employees present and they were instructed by Smith on how to solicit other employees. McEwen employees were told to return any signed cards obtained to McEwen employee Agnes Hooper. Some of the employees signed authorization cards at the meetings. Other authorizations were obtained by employee solicitors pursuant to Smith's instructions.

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[16]Each of the foregoing findings has not been considered in isolation but have been weighed upon the basis of Respondent McEwen's entire course of conduct and evolved from the record as a whole.

There were 109 authorization cards[17] offered for the purpose of proving that a majority of McEwen's employees had designated and selected the Union as the exclusive representative for the purpose of collective bargaining. Of the 109 cards, 100 were admitted as seemingly valid cards

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[17]On the face of the card appeared:

.....
Date of Signing

I, ... now employed by
(Print your full name here)

..... (Name of Company)

..... (Location)

have voluntarily accepted membership in the AMALGAMATED CLOTHING WORKERS OF AMERICA (AFL-CIO) and designate said Union as my collective bargaining agent in all matters pertaining to wages, hours and other conditions of employment. I hereby further subscribe to the dues deduction provisions printed on the reverse side of this card.

Signed .....

.....
(Operation and Department)

.....
(Phone No.) (Signer's Home Address)

On the reverse side of the card appeared:

I hereby authorize my Employer (the Company named on the reverse of this card) to deduct from my wages dues, that may be due to the Union (the Union named on the reverse of this card). This authority to make such deduction shall be irrevocable for the period of one year until the termination date of the collective bargaining agreement between my Employer and the Union, whichever occurs sooner, and I agree and direct that this authorization shall be automatically renewed and shall be irrevocable for successive periods of one year each and for the period of each succeeding collective bargaining agreement between my Employer and the Union, whichever shall be shorter, unless written notice is given by me to my Employer and the Union not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of each collective bargaining agreement between my Employer and the Union, whichever occurs sooner. If a new worker: this authorization becomes effective at the end of my trial period.

for the purpose of establishing the Union's alleged majority status.[18]

The parties stipulated that as of May 28, 1966,[19] eligible employees in the appropriate unit numbered 172. Thus, in order for the Union to establish a majority interest in the appropriate unit, it was necessary, on May 28, 1966, to have in its possession valid authorization cards numbering 87. Accordingly, if 14 of the 100 cards are invalid for the purpose of establishing the Union's majority, the Union's claim as the representative for the purposes of collective bargaining must fail.

The card of Margie James: James' card was authenticated by employee Weatherly who stated she saw James sign the card. James was called as a witness by McEwen. James testified without contradiction[20] that Weatherly said

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[18]Cards of the following employees were excluded: Virginia Tester, Kenneth Hollard, Erline Bledsoe, Pearlie Dominick, Fay Branch, Lula Smith, Bessie Lou Capps, Martha Ann Craft, and Nettie Boyd.

[19]May 28, 1966, was the date upon which McEwen received the Union's letter informing it that the Union had been "designated by a majority of [McEwen's] production and maintenance employees at their collective bargaining representative." The letter included the paragraph:

> We are prepared to prove our majority by submitting our authorization cards to a mutually agreeable third person provided that under no circumstances will the names of those employees who signed cards be revealed. We, therefore, request at this time an appointment to meet with you at your earliest convenience in order to commence collective bargaining negotiations.

[20]In crediting witnesses called by the Respondent to rebutt the *prima facie* validity of the cards considered hereafter, and in assessing the probative value of the evidence of the General Counsel and the Charging Party, the Trial Examiner has considered that neither the General Counsel nor the Charging Party called witnesses in rebuttal or explained their failure to call such witnesses although such witnesses appeared to have been available for testimony, some of whom testified in behalf of the General Counsel when he presented his case-in-chief.

In *N.L.R.B.* v. *Ohio Calcium Co.*, 133 F. 2d 721, 727 (C.A. 6), the court said:

(Footnote continued on following page.)

to her that "they had to have so many to sign the cards so they could have an election" and if she would sign the card she "wouldn't have to join the union if [she] didn't want to." James did not read the card.

From the foregoing testimony it appears that James signed the card upon the oral representation that such card would not be used for other than election purposes. Such a finding is buttressed by the fact that the employee did not read the card. Accordingly the Trial Examiner finds that James' card cannot be counted toward establishing the majority status of the Union. See *Jefferson Wire and Cable Corp.*, 159 NLRB No. 107, footnote 3 and cases therein cited.

The card of Hazel Curtis: Curtis testified (without contradiction) in respect to what employee Pearl Jones said to her, "She asked me if I would sign a union card and I asked her what the card was for and she said, 'For a union election.'" Curtis further testified that she had been told of no other purpose for signing the card. Curtis did not read the card.

For the same reasons expressed in connection with employee James' card, the Trial Examiner finds that Curtis' card cannot be counted toward establishing the majority status of the Union.

The card of Margaret Nell Frazee: Frazee's card was authenticated by employee Pearl Jones who testified that she saw Frazee sign the card. Frazee, called as a witness for McEwen, testified without contradiction that Jones said ". . . they had to have a majority before they could

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The well-known rule is applicable to Abel's testimony that when a party produces such evidence as it is in his power to produce, its probative effect is enhanced by the silence of his opponent and also where the party on whom rests the burden of evidence as to a particular fact has the evidence within his control and withholds it, the presumption is that such evidence is against his interest and insistence.

have an election and if they didn't get that, they couldn't have an election." Frazee did not read the card.

For the same reasons expressed in connection with employee James' card the Trial Examiner finds that Frazee's card cannot be counted toward establishing the majority status of the Union.

The card of Ruth Pittman: Pittman's card was authenticated by employee Agnes Hooper who stated she saw Pittman sign the card. Pittman, called as a witness for McEwen, testified without contradiction that she signed the card and gave it to Hooper without reading it. She said that Pearl Jones, Bonnie Brown (Weatherly), Agnes Hooper, and Christine Forrester had "all said it was to be —so we could have an election." Testifying specifically concerning her conversation with Hooper she testified, ". . . she just asked me to sign and told me they wanted to hold an election—so they could get enough to hold an election."

For the same reasons expressed in connection with employee James' card the Trial Examiner finds that Pittman's card cannot be counted toward establishing the majority status of the Union.

The card of Margie Adams: Adams, called as a witness for McEwen, testified without contradiction that prior to signing the card she had a discussion with Bonnie Brown [Weatherly] who had asked her to sign the card. Brown said that the purpose of the card "was to get an election; to get enough cards for an election." Adams did not read the card.

For the same reason expressed in connection with employee James' card the Trial Examiner finds that Adams' card cannot be counted toward establishing the majority status of the Union.

The card of Dorothy Parchman: Parchman, as a witness for McEwen, testified without contradiction that at the time she was given the card by employee Eunice May-

bury, Maybury said "it was to get so many cards signed for an election of the Union." Parchman did not read the card. Parchman testified, "I just sat with her when she filled it out and then I signed it."

For the same reasons expressed in connection with employee James' card the Trial Examiner finds that Parchman's card cannot be counted toward establishing the majority status of the Union.

The card of Blanche White: White, as a witness for McEwen, testified without contradiction that she signed and dated the card given to her by employee Hettie Rye but did not read it. At the time Rye told her that "they had to have so many before the election. . . ." Rye also said that she "could vote any way [she] wanted to vote when the elections came in."

For the same reasons expressed in connection with employee James' card the Trial Examiner finds that White's card cannot be counted toward establishing the majority status of the Union.

The card of Pearlene Brooks: Brooks, as a witness for McEwen, testified without contradiction that Earline Bailey gave her the card and said that "it was to show that we might be interested in the Union." Brooks did not read the card.

In view of the fact that Brooks did not read the card it may not be inferred from the representation of employee Bailey that Brooks signed the card for the purpose set forth on the card. It would appear, therefore, that the General Counsel has not sustained his burden of proving that the card was signed for the purpose of designating the Union as Brooks' bargaining agent. The Trial Examiner finds that Brooks' card cannot be counted toward establishing the majority status of the Union.

The card of Irene Buchanan: Buchanan's card was authenticated by Agnes Hooper who testified that she saw

Buchanan sign the card. Buchanan, as a witness for McEwen, testified without contradiction that Hooper said to her when she solicited the card that "it was to get enough cards to hold an election." Buchanan testified that she read the card and observed the language on the back which indicated that she was signing a checkoff of dues for the Union. Whereupon, she asked Hooper whether she would "automatically be a member of the Union" if she signed the card. Hooper replied "No, it was just to get enough for an election."

From the foregoing testimony, it follows that Buchanan signed the card upon the representation that it would not be used other than for election purposes. The Trial Examiner finds that Buchanan's card cannot be counted toward establishing the majority status of the Union.

The card of Lemuel L. Palk: Ellen Betty Elliott testified that she gave Palk a blank authorization card. Later he told her it was in the pocket of his car. Elliott picked up the card out of the pocket of the car. At the time a signature was on the card. Elliott inserted the name of McEwen and the word "bundleboy." Elliott did not see the card signed. Palk was not working for the employer at the time of the hearing. His absence as a witness was not accounted for. The Trial Examiner is of the opinion that the General Counsel has not submitted sufficient proof to establish the authenticity of Palk's alleged signature by a preponderence of the evidence. The Trial Examiner finds that Palk's card cannot be counted for the purpose of establishing the majority status of the Union.

The card of Eldton Bishop: Agnes Hooper testified that she witnessed the execution of Bishop's card on May 11, 1966. The printed name Eldton Bishop appears on the card over the words "Print your full name here" and opposite the word "Signed." Hooper testified that she printed the name Eldton Bishop over the words "Print your full name here." Bishop was not called to verify his

alleged printed signature. Bishop's Form W-4 (Employee's Withholding Exemption Certificate) signed April 26, 1966, shows Bishop's signature signed in script as "Roy Eldton Bishop." There is no visible similarity between the printed signature attributed to Bishop and the script signature appearing on the Form W-4.

Since Bishop's alleged signature on the card does not appear to have been written in the manner in which he customarily signed documents connected with his employment it is the opinion of the Trial Examiner that the General Counsel has not submitted sufficient proof to establish the authenticity of Bishop's alleged card by a preponderance of the evidence. The Trial Examiner finds that Bishop's card may not be counted for the purpose of establishing the majority status of the Union.

The card of Norma Jean Black: Employee Carolyn Betty testified that she gave a blank authorization card to employee Black who returned it to her with a printed signature thereon on May 10, 1966. Betty did not see Black execute the card. Black has not been employed by McEwen since July 15, 1966. Black was not called for testimony. Black's Form W-4 reveals that she signed her name in script. The Trial Examiner is unable to discern any similarity between the printed signature attributed to Black and the script signature appearing in the Form W-4.

Since Black's alleged signature on the card was not verified by Black or a person who witnessed the execution of the signature and does not appear to be written in the manner in which Black customarily signed documents connected with her employment, it is the opinion of the Trial Examiner that the General Counsel has not submitted sufficient proof to establish the authenticity of Black's alleged card by a preponderance of the evidence. The Trial Examiner finds that Black's card can not be counted for the purpose of establishing the majority status of the Union.

The card of William D. Shields: Agnes Hooper testified that she witnessed the execution of the signature, William D. Shields, on a union authorization card on May 10, 1966. No employee by the name of William D. Shields was listed on McEwen's payroll of May 28, 1966. On the payroll appears a "Billy Shields" and a "Bobbie Shields." A Form W-4 shows the name "Billy Shields" at the top and "Billy D. Shields" opposite the word "Signed." Billy Shields left the employ of McEwen during the week ending June 6, 1966. William D. Shields was not called for testimony. The record is barren of any proof that the same person who signed the Form W-4 also signed the card.

Under these circumstances the Trial Examiner is of the opinion that the General Counsel has not submitted sufficient evidence to establish by a preponderance of the evidence that Billy Shields whose name appears on the May 28, 1966, payroll is the same person who signed William D. Shields on the card. The Trial Examiner finds that Shields' card may not be counted for the purpose of establishing the majority status of the Union.

The card of Ruby Nell Christian: As a witness for McEwen, Christian verified her signature on the card and testified that her signature was the only entry she made on the card. Christian's signature is in pencil; all other entries on the card are in ink.

Christian testified that to the best of her recollection the card was signed about the middle of June, just before the vacation period. Hooper was sitting next to Christian in an automobile at the time she signed the card. Christian said Hooper had been "hounding" her everyday to get her to sign the card and that she signed it so that Hooper would "hush." Hooper was not called to contradict the testimony of Christian.[21]

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[21]On direct examination Hooper was handed a number of cards including Christian's card and was asked whether they were

(Footnote continued on following page.)

Under these circumstances the Trial Examiner is of the opinion that the General Counsel has not submitted sufficient evidence to establish by a preponderance of the evidence that Christian signed her card prior to May 28, 1966. The Trial Examiner finds that Christian's card can not be counted for the purpose of establishing the majority status of the Union as of May 28, 1966.

Thus it appears that on May 28, 1966, the Union had not been designated or selected by the majority of McEwen's employees in an appropriate unit as the exclusive representative for the purposes of collective bargaining within the meaning of Section 9(a) of the Act. Accordingly those allegations in the complaint charging a violation of Section 8(a)(5) of the Act are dismissed.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy.

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Furthermore, in accordance with the Board's decision in *H. W. Elson Bottling Company,* 155 NLRB 714, it is recommended that the Union be given an opportunity to present its views to the voting unit employees assembled on com-

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signed on "the date indicated on the cards." She answered, "I would say they were." Such testimony, in answer to a leading question, in the light of Christian's testimony, appears to have little probative value.

pany time and premises. It is further recommended that, upon the request of the Union, Respondent shall make available to the Union and its representatives at a mutually agreeable time within 3 months of the Recommended Order herein, suitable facilities such as are customarily used for employee meetings so that the Union may speak to the voting unit employees assembled on company time. Such facility shall be available for one 1-hour meeting.

It is further recommended that upon the request of the Union made within 1 month from the date of the Recommended Order herein, the Respondent immediately grant the Union and its representatives reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted.

Conclusions of Law.

1. The Union is a labor organization within the meaning of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended that the Respondent, McEwen Manufacturing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals to discourage their affiliation with or support of any labor organization; unlawfully interrogating employees concerning union activities or affiliations; or unlawfully impressing employees with the futility of selecting the Union as a collective-bargaining representative.

(b) In any like or similar manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist Amalgamated Clothing Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is found will effectuate the policies of the Act:

(a) Upon request of the Union, made within 1 month after the date of this Recommended Order, immediately grant the Union and its representatives reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted.

(b) Upon request of the Union, make available to the Union and its representatives, at a mutually agreeable time within 3 months from the date of this Recommended Order, suitable facilities such as are customarily used for employee meetings so that the Union may present its views to the employees assembled on company time. Such facilities shall be made available for one 1-hour meeting.

(c) Post at its McEwen, Tennessee, establishment copies of the attached notice marked "Appendix."[22] Copies of

[22]In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the

(Footnote continued on following page.)

said notice, to be furnished by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.[23]

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the act other than those found in this Decision.

Dated at Washington, D.C.

APPENDIX.

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT question you in any way over the Union so as to violate the law.

WE WILL NOT question you concerning what you are doing about the Union.

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notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[23]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

WE WILL NOT threaten you about losing your jobs, about the plant closing, or threaten you in any other way concerning the Union.

WE WILL NOT tell you it would not be any use to get the Union in the plant.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of the right of self-organization, to form labor organizations, to join or assist the Amalgamated Clothing Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any and all such activities.

WE disavow any claim, assertion, or implication made by any of our representatives that our McEwen operation will be curtailed or discontinued as reprisal for our employees' affiliation with or support of any labor organization.

WE WILL upon request of the Union, immediately grant the Union and its representatives reasonable access, for a 3-month period, to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, upon request of the Union, make available to the Union and its representatives, at a mutually agreeable time within 3 months of the Recommended Order herein, suitable facilities such as are customarily used for employee meetings so that the Union may present its views to the employees assembled on company time. Such facilities shall be made available for one 1-hour meeting.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization.

McEwen Manufacturing Company
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee, 38103, Telephone 543-3161.

McEwen, Tennessee

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

TWENTY-SIXTH REGION

McEwen Manufacturing Company
Employer-Petitioner

and

Amalgamated Clothing Workers of America, AFL-CIO
Union

Case No. 26-RM-205

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION.

Pursuant to a Stipulation for Certification upon Consent Election executed on July 11, 1966, an election by secret ballot was conducted on July 27, 1966, under the direction and supervision of the Regional Director for Region 26 among the employees in the stipulated unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 164 eligible voters, 160 cast ballots, of which 60 were for, and 96 against, the Union, 1 ballot was challenged, and 3 ballots were void. The challenged ballots were not sufficient in number to affect the results of the election. Thereafter, the Union filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an

investigation and, on September 2, 1966, issued and duly served upon the parties his Report on Objections, in which he recommended that objection 1 be sustained, the election set aside, and a new election directed. The Regional Director also recommended that objections 2, 3, and 4 be overruled. Thereafter, the Employer filed timely exceptions to the Regional Director's report. The Union filed timely exceptions conditioned on the Board's overruling the Regional Director's recommendation to sustain objection 1.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case, to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Union is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All production and maintenance employees of the Employer at its McEwen, Tennessee, plant, including the shipping clerk, the mechanics, the ticket and recut girl and the marker, but excluding the foreladies, cutting department foreman and all office clerical employees and all guards, professional employees and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the Employer's exceptions,[1] and the Union's conditional exceptions thereto, and for the reasons set forth in his report, hereby adopts the Regional Director's findings and recommendations,[2] with the modification herein noted.[3]

Accordingly, we shall set aside the election and direct that a new election be held.

ORDER.

It Is Hereby Ordered that the election conducted herein on July 27, 1966, be, and it hereby is, set aside.

DIRECTION OF SECOND ELECTION.

A second election by secret ballot shall be conducted among the employees in the unit found appropriate at such time as the Regional Director deems appropriate. The Regional Director for Region 26 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily

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[1]We find no merit in the Employer's contention that the Regional Director in recommending that the election be set aside went outside the scope of the objections filed by the Union and by relying upon the Employer's speech of July 26, 1966. It is well settled that the jurisdiction of the Regional Director in making post-election investigations is not limited to the specific issues raised by the parties. See, for example, *The Glidden Company*, 121 NLRB 752, 753; *Carter-Lee Lumber Company*, 119 NLRB 1374, and cases cited therein.

[2]Member Fanning would rely only on that part of the pre-election statements wherein the Employer in effect threatened not to renew its lease and to discontinue its operations in the event the Union won the election.

[3]We do not pass on and hence do not adopt the Regional Director's findings and recommendations with respect to objection 2.

laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligibile to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[4] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Amalgamated Clothing Workers of America, AFL-CIO.

Dated, Washington, D.C., Nov. 18, 1966.

John H. Fanning, Member

Gerald A. Brown, Member

Sam Zagoria, Member

(Seal) National Labor Relations Board

[4]An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 26 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB No. 111.

REPORT ON OBJECTIONS.

Based upon a petition filed on June 15, 1966, and pursuant to a Stipulation for Certification Upon Consent Election executed by the parties and approved by the Acting Regional Director for the Twenty-sixth Region on July 11, 1966, an election by secret ballot was conducted on July 27, 1966, among certain employees[1] of the Employer at its plant located in McEwen, Tennessee. The results of the election, as disclosed by the Tally of Ballots, served upon the parties at the conclusion of the election, are as follows:

Approximate number of eligible voters	164
Void ballots	3
Votes cast for Union	60
Votes cast against participating labor organization	96
Valid votes counted	156
Challenged ballots	1
Valid votes counted plus challenged ballots	157

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has not been cast for Union.

On August 3, 1966, the Union filed timely objections to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. The Union's objections are as follows:

1. In a five-page typewritten letter mailed to all employees on or about July 14, 1966, the Employer:

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[1]All production and maintenance employees of the employer at its McEwen, Tennessee plant, including the shipping clerk, the mechanics, the ticket and recut girl and the marker, but excluding the foreladies, cutting department foreman and all office clerical employees and all guards, professional employees and supervisors as defined in the Act.

(a) threatened that it would not renew its lease if the Union won the election,

(b) stated that it would not yield to any Union demands if the Union were designated collective bargaining agent, and that the Union would have to strike to enforce its demands,

(c) threatened the employees with loss of working time, loss of jobs and plant shut-down if the Union won the election.

(d) made promises of benefits to employees contingent upon the defeat of the Union in the election,

(e) by the totality of its letter and viewed in the context of prior conduct by the Employer, the Employer impressed upon the employees the futility of voting for the Union.

2. On or about June 22, 1966 a supervisor, acting as an agent of the Employer, threatened an employee with plant closing if the Union won the election.

3. On or about July 11, 1966 the Employer discharged Betty Turner for the purpose of discouraging a vote in favor of the Union.

4. Shortly before the election, the Employer engaged in unlawful surveillance of a Union meeting.

Pursuant to Section 6 of the Stipulation for Certification Upon Consent Election and Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the objections to be made, during which all parties were afforded full opportunity to submit evidence bearing on the issues, and the undersigned, having duly considered the results thereof, reports as follows:

OBJECTION 1:

It is undisputed that on July 14 or 15, 1966, the Employer mailed to all its employees a letter, copy of which is attached hereto as Exhibit 1.

The Union contends that the letter should be considered in context with a speech made by company official Jack Pedigo on June 3 or 4, 1966, and also in context with alleged threats by supervisors made to employees on or about June 7, 8, and 13. As incidents occurring before the filing of a petition may not be considered as a basis for objections, this contention of the Union is rejected.[2]

On July 26, 1966, company official Jack Pedigo addressed the employees. The speech, copy of which is attached hereto as Exhibit 2, ended more than twenty-four hours before the time of the election. Employee witnesses submitted by the Union who testified concerning the speech gave versions which indicate the copy furnished by the Employer is an accurate version of what Pedigo said.

After careful reading and consideration of the letter and speech it is found that the main theme of the Employer's campaign was the futility of selecting the Union as the collective bargaining representative, and the dire consequences which might be expected. Thus, the opening thrust of the letter voices the Employer's opinion that the Union would not help the employees or the Company and expresses the first belief ". . . that the Union will hurt you and it could destroy us—that is just how serious this matter is." (underlining supplied)

Both appeals to the employees emphasized the Union's inability to do more than make promises and stress the fact that only the Employer could grant benefits. These appeals were so worded as to convey the message that the Union's requests would fall on deaf ears, and only by striking could the Union attempt to make good on its promises.

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[2] *Goodyear Tire and Rubber Company*, 138 NLRB 453.

Having impressed upon the employees the idea that a strike was probable rather than just a possibility if the Union were selected, the Employer raised the spectre of plant closing, with pointed reference to the recent closing of a plant in a nearby city after organization by the Union. The reference to the company's intent to renew its lease contained a proviso which warned the employees that the Union might make conditions such that the Company would not feel justified in renewing its lease, but failed to indicate what type of conditions would so influence the decision. Under these circumstances it is found the letter intended to, and did, convey the message that the mere selection of the Union could cause the Employer to decide not to renew its lease and to discontinue its operation.

In view of the foregoing, it is found that by its letter of July 14 or 15 and the speech of Pedigo on July 26, the Employer created an atmosphere of fear in which the free expression of choice of the employees was rendered impossible, and merit is found to this objection.

Accordingly, it is recommended that Objection 1 be sustained.

OBJECTION 2:

In support of this objection, the Petitioner submitted an employee witness who testified that on the morning of July 18, 1966, floorlady Edna Hargis, an admitted supervisor, approached and immediately asked what the employee thought about the Union. The employee responded that she thought the Union ". . . was all right" and Hargis then wanted to know what the Union could do for the employees. The employee merely stated that she was for the Union and Hargis walked away without further comment. According to the witness, Hargis returned about 1:15 p.m., said she was talking to the employee as a friend, that she had worked for the Company for several years and knew it would not

". . . stand for a union coming in." According to the employee, Hargis mentioned the possibility of a strike and resultant loss of work and again asked what the employee thought the Union would do for the employees. When told the employee thought the Union could do a lot, Hargis said she did not want the employee to change her mind but did want the employee to really think about the way she should vote.

Hargis denied that she ever mentioned or discussed the Union with any employee and also denied that she ever asked any employee what the employee thought about the Union.

The employee witness had signed a union card, attended union meetings, and associated with other union adherents. Thus, it would appear her prounion sentiments would be known within her department, making it unnecessary for Hargis to question her. As no other instances of similar nature involving Hargis or any other supervisor were alleged, Hargis' denial is credited. In any event, assuming the incident occurred as alleged, it would be one isolated incident involving one employee in a unit of approximately 156 employees and would not, of itself, warrant the setting aside of the election, and this objection is found to be without merit.

Accordingly, it is recommended that Objection 2 be overruled.

OBJECTION 3:

Betty Turner's employment terminated on or about July 12, 1966. Although the Union contends Turner was discharged, rather than voluntarily quitting as asserted by the Employer, no charge alleging Turner was discriminatorily discharged has been filed. Consequently, this objection is found to be without merit.

Accordingly, it is recommended that Objection 3 be overruled.

OBJECTION 4:

Employee witnesses testified that a Union meeting was held in the American Legion Hall in Waverly, Tennessee, on a night within a week of the election, and that the automobile of plant manager Thomas M. Robertson was parked at a cafe about one block away for a period of about one half hour. Union attempts to photograph the car with a flashbulb camera proved unsuccessful. Two employees testified that they passed Robertson on the highway on the way to Waverly and that after they parked they saw Robertson park in front of the Dixieland Coffee Shop. One of these employees continued to observe Robertson and saw him get out of his car and go into the coffee shop without delay. No employee saw him again until he left about a half hour later at which time he went directly to his car and immediately drove away.

Robertson testified that for the past three years it has been the custom for his wife and him to ". . . drop in the Dixieland Coffee Shop in the evenings either for supper or after supper for a cup of coffee." The operator of the coffee shop, Louise Nolan, testified that ever since she opened the shop about three years ago the Robertsons have dropped in on the average of once or twice a week, but more often in the summer. This testimony of Robertson and Nolan is credited.

Robertson testified that on the night in question he sat in his usual place in the restaurant facing the kitchen, that there was no mention of a union meeting, and denied that he was aware a meeting was scheduled. Nolan corroborates the fact there was no mention of a union meeting. They both remember the night because camera flashbulbs flashed while Robertson was paying his bill. They looked out the window and saw a union representative apparently photographing Robertson's car. The Robertsons then left the coffee shop and drove away.

In view of the credited testimony that Robertson and his wife often frequent the cafe in the evenings and absent any evidence that Robertson engaged in surveillance of the meeting, no merit is found to this objection.

Accordingly, it is recommended that Objection 4 be overruled.

CONCLUSION AND RECOMMENDATION.

Having recommended that Objection 1 be sustained and Objections 2, 3, and 4 be overruled, and as the Tally of Ballots reveals that the Union did not secure a majority of valid votes cast, it is further recommended that the election herein be set aside, and a new election be directed.

Dated at Memphis, Tennessee, this 2nd day of September, 1966.

(s) John J. A. Reynolds, Jr.
Director
Twenty-sixth Region
National Labor Relations Board
746 Federal Office Building
167 North Main Street
Memphis, Tennessee 38103

EXHIBIT 1

McEWEN MANUFACTURING COMPANY
McEwen, Tennessee

To All Employees of
McEwen Manufacturing Company

This letter is addressed "To All Employees" of this company because what we are writing about concerns the future of all employees.

So that all of you could have a fair and honest chance to express your desire for or against Union representation,

the company requested the National Labor Relations Board to hold an election. The election by secret ballot will be held in the loading dock area on July 27, 1966. Private booths will be set up so that only the person voting will ever know how he or she voted. It will be truly a secret ballot. You will vote on company time without any loss of pay for the time you spend in voting.

We want you to have the facts on all sides so as to make up your mind about this very serious decision. We hope that you will read every word of this letter and after you read it you will consider what is said, discuss it with your fellow employees and discuss it with the plant manager and supervisors if you want to, because each and every one of us is interested.

In the beginning we want you clearly to understand that the company hopes, trusts and believes that in your good judgment you will vote against the Union. In our opinion, the Union will not help you and will not help us. On the other hand, we firmly believe that the Union will hurt you and it could destroy us—that is just how serious this matter is.

You might ask yourself whether or not it is to your best interest to vote for this Union. In answering this question, there are several things that you might consider.

In the past this company has been able to provide steady employment, wages comparable and competitive with those of other manufacturers in the area, vacation pay, holiday pay, hospital and medical insurance, a bonus at Christmas, and quiet and peaceful working conditions.

Now, what does the Union offer? (End of page 1)

Some people think that just by getting a Union there is automatically an increase in pay and benefits of various kinds. This is absolutely not true. Voting for the Union will not automatically bring any wage increases or any other benefits.

If this Union were to be voted in, there would still be no way that it could force the company to do anything that we are not willing or able to do. The Union could call you out on strike. The Union could stop you from working for us. Please realize and understand in advance, however, that this company has no intention of yielding to any sort of strike pressure to force it to do something that it otherwise would not be willing to do.

Strikes take place where there are Unions. Everybody knows that, and everybody knows that strikes mean trouble and dissension, strife and misery, lost work and lost pay. You have all read and heard about strikes in our own area, as well as elsewhere in which people pulled out by their Unions have stood around day after day and week after week on picket lines, while their bills and expenses continue and obligations pile up on their homes, their automobiles and all their other belongings. What have the Unions gained for the people who are involved in these strikes? As a rule the answer is nothing except trouble and misery, debt and regret. This could happen here if a Union is voted into this plant, for we will not be bullied, we will not be coerced by a Union.

There are cases where people who are out on a strike not only gain nothing, instead they have lost their jobs. If a Union calls people out on strike to try to force the company to agree to what the Union wants, it is definitely the right of the company to fill the jobs of those who see fit to go out on strike. Those people whose jobs are filled while they are out on strike will have no right to return to their jobs or to get their jobs back even when the strike has ended. And remember this, employees out on strike do not draw unemployment benefits.

Now do you want to subject yourself, your fellow employees and your company to this sort of thing? We have never had it here and we hope that we will never have it.

(End of page 2)

Unions do not come free. You pay. You pay initiation fees plus assessments, plus monthly dues, and these can easily add up to $100.00 or more for a year. It is common practice for Unions to levy fines for failure to attend Union meetings, or for violation of other Union-made rules.

The Union which is seeking to represent you has had its share of strikes. At Henderson, Tennessee at this very moment a plant has been closed, machinery has been moved out, and piece goods and even the garments in the process of manufacture have been moved. The strike started about the first of May and the plant has been closed since that time. Nobody knows when, if ever, that plant will reopen. What has the Union got for those people except trouble? Now do you want the Union to close your plant? The Union can't close your plant unless it is voted in, but if it is voted in the Union can do the same thing here that the Union did for the employees of Shults Mfg. Co., at Henderson, Tennessee. The Union closed that plant and put those people out of work. That is the same Union which is asking you to give it your money in order that it may come in here and possibly do the same thing here that it has done at Shults Mfg. Co.

Yes, this question of voting in a Union is a serious matter and should not be taken lightly.

When you think about these things you also will want to think about your past and your present relations with the company. We are not perfect, and we do not pretend to be. We are, however, genuinely and sincerely interested in our employees and their well being. In the past we have improved your earnings and raised your wages. It is our hope and intention to keep improving these conditions. You can count on that without having to pay any Union dues to accomplish it. With respect to other benefits, you have vacations and vacation pay, paid holidays, insurance with hospital and medical and surgical coverage, and the bonus at Christmas. You received all of these benefits

without paying Union dues for them. We have improved these conditions in the past and it is our hope and intention to continue to improve these benefits. It will not require any Union to keep these benefits for you, and it will not require any Union to have improvement in those conditions. (End of page 3)

Now some of you have signed Union authorization cards. Sometimes these cards are signed without knowing what they mean. Sometimes they are signed because of the pressure which has been put on a person to sign one. The fact that an employee has signed an authorization card does not mean that he or she has to be for or vote for a Union in the election. When you go into the voting booth with the ballot in your hand, the decision you make there is the decision that counts. It is your future that is involved. If you vote "NO" you are voting against the Union, you are voting for uninterrupted steady employment without payment of Union dues, improvement in wages and other benefits as and when circumstances permit the company to make those improvements, and you are voting for continued operation of your plant.

If you vote "Yes" you are voting to pay Union dues which will get you nothing in addition to what you otherwise could get. You are voting for Union demands against the company which could result in strikes, loss of time, loss of jobs, and possible loss of your company and plant because of Union demands, Union pressure and Union violence.

We ask you to vote "NO" because we are certain in our own minds from all the experiences we see around us that it is to your best interests to keep this Union out.

Nineteen years ago, on the 1st of July, 1947 to be exact, McEwen Manufacturig Company entered into a lease agreement with the City of McEwen leasing the present plant property. This lease expires June 30, 1967. The company hopes to be able to continue to operate in McEwen in the

plant which it now occupies. In order to do so, it will be necessary that a new lease be negotiated within the next period of eleven months. Please be assured that the company intends to continue to operate and to negotiate a new lease if it can do so; provided, of course, that some thing or some agency, such as the Union, does not make conditions such that the company would feel that it would not be justified in endeavoring to make a new lease. The question as to whether or not a new lease will be made is a decision that management must make in the next few months in the light of the circumstances that exist at the time. We are saying this to you because the question of the lease may be mentioned by someone in the course of the next several months. (End of page 4)

We believe in the employees of McEwen Manufacturing Company. We are proud to have you working for this company. We believe that you are people of good judgment. We ask you to help yourselves and at the same time to help us by voting "No" when you mark your *secret* ballot on July 27th.

If you want to discuss anything that is said in this letter with any supervisor, plant manager or other official of the company, all you have to do is to let us know and we will talk with you about this letter, the Union, or anything involving your employment.

With our very best wishes.

Sincerely yours,

McEwen Manufacturing Company,
By /s/ Jack Pedigo,
/s/ T. M. Robertson.

EXHIBIT 2

McEWEN MANUFACTURING COMPANY

This is the last opportunity that I will have to talk to you as a group before the election tomorrow morning. As the time for this election has drawn closer, I have been more and more impressed with just how serious a matter this is for you. for me and for the Company.

I believe that people like to have some feeling that they are assured of steady employment at a fair wage and under reasonable working conditions. As you know, all of us work in a highly competitive industry. We have to compete with hundreds of other manufacturers who make the same products which are made at this plant. If our cost of making the garment is not competitive, then there are no jobs. We have tried and, up to this point, have succeeded in meeting our competition and at the same time providing steady jobs with increases in wages from time to time and additional benefits in the form of insurance, paid holidays, paid vacations and the Christmas bonus.

I have always felt that the people who work here have had the feeling that they had security in their jobs. This is because the Company has been able to make its prices to meet competition and in doing so has been able to control the production, make the jobs available, increase these wages and add these benefits.

The Company has not had to meet with a Union on any matter concerning the operation of this business. Under the Company management, you have had these things without Union interference. (End of page 1)

The Union proposes that you pay it money and in return for that it promises you increases in wages and increases in a lot of other benefits. The Union can't make you these promises and deliver on them. When the Company

promises to do a thing, the Company can fulfill that promise. The Union can't fulfill its promises, because the Union cannot get anything for you that the Company is not willing to give. Unions can make promises, but only the Company can fulfill a promise, and I tell you no Union can make a promise for us.

If the Union promises you things that the Company is not willing to give, then the Union has to either renege or it has to try to force the Company to fulfill the Union promise. Now, how does a Union go about making a company do something that the company is not willing to do? There is only one way that it can exert pressure on a company and that is by using you and your jobs and your employment and your job security as a weapon against the company. By that, I mean the Union can tell the Company that if it does not do what it says do, it will call the employees out on strike. I have told you this before, and I tell you again, we will not be pressured, coerced or intimidated by any Union. If you bring the Union in here, it can take you out on strike, but that does not mean that the Company has to do what the Union says.

This Union that is asking you to vote for it and to pay to it initiation fees, dues and assessments, is the same Union that went over to Henderson, Tennessee, and organized a little plant called "Shults Mfg. Co." The Union made its demands on (End of page 2) that company. The company did not feel that it could meet the demands. The best that the company felt it could do was not satisfactory with the Union. The Union called the people out on strike on May 3rd of this year. The plant has been idle since May 3rd and the employees have been out of jobs. In the meantime, machinery and piece goods have been moved out of the plant. The result of the Union organization of that plant then has been to close a plant and leave it idle and to take people out of jobs and leave them idle. And these idle people cannot draw unemployment benefits.

Now, let's just compare that sort of situation with what we have had here at McEwen Manufacturing Company. Work has been steady; jobs have been secure; wages have been increased and benefits have been increased. You have had these things without a Union and without a Union you can continue to have them.

The management of this Company feels that it knows how to run this Company and does not need a Union to tell it how to run it. The Union doesn't put a dime into the plant. The Union does not pay the employees of this Company anything. The Union takes from the employees of the Company a part of what it pays the employees. We firmly believe that the Union cannot get you anything for the money it would require you to pay. We know what we can do, we know what we are willing to do, and no Union can change that.

We believe in peace, working together, producing goods for sale and paying our employees. We do not believe in violence, unrest, disturbance, picket lines, strikes, bitter language, work (End of page 3) stoppages or having the welfare of our employees depending upon the whim of some Union boss.

With the employees and the Company working together, understanding each other, we feel that we can continue to progess, that we can continue to improve wages, that we can continue to improve benefits, that we can better working conditions, that we can continue to have steady employment and that the people who work for us can continue to have job security. With a Union in here, we believe that there will be trouble, that there will be work stoppages, that there will be strikes, that there will be loss of jobs, and we fear that this Union will do the same thing for you and this Company that the Union has done to the employees of Shults Mfg. Co., and that company. We do not want that to happen. It will not happen if we have any control

of the matter, but if the Union comes in then the Company cannot be responsible for what happens after that.

We earnestly and sincerely tell you that we do not believe that this Union can bring you anything good, but that it will bring to you and to us trouble. We have not had that trouble. We do not want that trouble. When you go to vote tomorrow, we ask you to vote "NO" for it is our firm conviction that a "NO" vote is in your own best interest.

We have tried to explain to you our feeling and our position about this. It should be clear by this time. What you do tomorrow will depend upon your own judgment, for the choice is yours. We cannot control your choice. We can only tell you what we think the future holds. We know what the future holds if (End of page 4) you vote "NO". If the majority of you vote "YES", no one knows what troubles, disturbances and problems the future will bring or what future, if any, the Company has.

The ballot will be secret. Regardless of whether you have or have not signed a Union card, your vote is what counts now. No one will ever know how you vote unless you, yourself, make it known. When you take that ballot in your hand, please remember everything that is at stake.

Again, with all the sincerity that I have, I ask you to vote "NO".

EXCERPTS FROM NATIONAL LABOR RELATIONS ACT.

National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C.A. 151 *et seq.*).

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose

of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

Unfair Labor Practices.

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Representatives and Elections.

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or

labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a): the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Prevention of Unfair Labor Practices.

Sec. 10 (d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question

determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought

may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1123

MCEWEN MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In May 1966, the Amalgamated Clothing Workers of America, AFL-CIO, commenced an organizational drive among the Company's employees. By May 28, it had obtained authorization cards from 109 of the 172 employees in the bargaining unit (Pet. App. 13a; R. 71-73).[1] The Company refused the

[1] "R." references are to the printed Appendix to the parties' briefs in the court below. "S.R." references are to the printed supplemental appendix filed below.

Union's request for recognition based on an examination of the authorization cards by a mutually agreeable third party and, on June 15, filed with the Board's Regional Office a petition for a representation election among its employees (Pet. App. 32a, 51a, n. 19; S.R. 90). On July 27, the Board conducted an election among the Company's employees, which the Union lost. The Union filed objections and, on September 2, the Regional Director recommended that the election be set aside and a new election be directed (Pet. App. 32a, 68a-74a). On November 18, the Board affirmed the action of the Regional Director (Pet. App. 64a-67a).

2. In the interim, the Union had filed unfair labor practice charges alleging that the Company had restrained and coerced employees and had unlawfully refused to bargain with the Union; the Board's General Counsel issued a complaint based on these charges (Pet. App. 32a-34a). After the hearing the Board found that the Company had violated Section 8(a)(1) of the Act by the threats contained in a letter and speech by its President on July 14 and 26, respectively,[2] and by the "extensive and widespread acts of interrogation and intimidation" engaged in by its supervisors (Pet. App. 10a-12a, 47a-49a). The Board also found that the Union had held valid authorization cards from a majority of employees in the appropriate unit on May 28, 1966 (when the Union made its demand for recognition), that the Company had refused to recognize the Union in order to gain time in

[2] This letter and speech were the basis for setting aside the election (Pet. App. 70a-71a).

which to dissipate the Union's majority, and that the Company thus violated Section 8(a)(5) of the Act (Pet. App. 13a, 26a, 31a).

The Board ordered the Company to cease and desist from the unfair labor practices found and from otherwise restraining or coercing its employees in the exercise of their organizational rights, and further ordered it to bargain collectively with the Union upon request (Pet. App. 27a-30a). The Board found that a bargaining order was necessary to remedy the violation of Section 8(a)(5), and also because the Company's Section 8(a)(1) "conduct made impossible the holding of a fair election" (Pet. App. 31a). The court of appeals enforced the Board's order in full (Pet. App. 1a-6a).

3. Petitioner does not here challenge the Board's unfair labor practice findings, which were sustained by the court below. Rather, petitioner's basic contention is that, because the Board set aside the first election as a result of the Union's objections and directed a second election, it was thereafter precluded from relying on authorization cards to establish the Union's majority status and from entering a bargaining order based thereon (Pet. 19-22). However, when the Board decided to set aside the first election and direct a new one, a complaint had not as yet issued on the unfair labor practice charges which the Union had just filed. The only issue before the Board at that time was whether the President's letter and speech warranted setting that election aside; upon agreeing with the Regional Director that they did, the Board followed its normal practice in a representation proceeding—

setting aside the election and ordering that a new one be held "at such time as the Regional Director deems appropriate" (Pet. App. 66a). No choice-of-remedies issue was presented at this stage. The first occasion the Board had to focus on the fairness of holding a second election and the existence of alternative remedies arose during the unfair labor practice proceeding. That proceeding established both the full pattern of the Company's acts of restraint and coercion and the Union's prior success in obtaining valid authorization cards from a majority of the employees in an appropriate unit. In these circumstances, the Board was not estopped to conclude that a fair re-run election could not be held and that a bargaining order was the only effective remedy for the Company's unfair labor practices. The Board held in *Bernel Foam Products Co.*, 146 NLRB 1277, that a union does not waive its right to pursue unfair labor practice charges arising out of an organizational campaign by electing to proceed to an election in the face of conduct it considers objectionable; that decision was approved by this Court in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 615, n. 34, and its application here—which is the essence of petitioner's challenge—raises no issue warranting further review.[3]

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[3] Similarly, the stipulation as to the payroll date for the election did not preclude a finding that the Union had a card majority on an earlier date. The former date is selected by the parties only for the purpose of determining which employees are entitled to vote in a scheduled Board election. The refusal to bargain issue is whether, on the date of the refusal, the Union possessed a majority of valid authorization cards.

4. Petitioner's final contention (Pet. 24-25), that the Board impermissibly modified its order without notice to the parties, is without merit. The Board's order was issued on July 3, 1968. On August 15, 1968, not 1969, while the case was pending on petition for review in the court below and long before this Court's decision in *Gissel*, the Board issued an errata sheet (Pet. App. 30a-31a) adding a paragraph explaining the Board's rationale which had been "inadvertently omitted." As the court below held: "The additional paragraph in no way altered the remedial order; it merely amplified the rationale behind the Board's decision and helped explain why the Board felt that an order to bargain would be necessary. The company was in no way prejudiced by the addition of this errata." (Pet. App. 3a, n. 5.)

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

FEBRUARY 1970.

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